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No. 81-5189

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GEORGE MERCER, Petitioner

vs.

STATE OF MISSOURI, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF MISSOURI

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vs.	)	No. _____
STATE OF MISSOURI, Respondent.	)	

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

TO: THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

George Mercer, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment and opinions of the Supreme Court of the State of Missouri entered in this proceeding on May 11, 1981. Petitioner's timely Motion for Rehearing was denied on June 4, 1981.

OPINIONS BELOW

The opinions of the Supreme Court of Missouri, not yet reported, appear in the appendix. Included as part of the appendix to this Petition are the majority and dissenting opinions of the Supreme Court of Missouri entered in this proceeding on May 11, 1981 and the Notice advising of the entry of the Order overruling petitioner's Motion for Rehearing on June 4, 1981.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

This cause presents the following questions of interest and importance which warrant and necessitate the attention of this Court, to-wit:

(1) Were prospective jurors expressing hesitancy or conscientious scruples against the imposition of capital punishment excluded from serving on the jury in violation of the Sixth and Fourteenth Amendments to the United States Constitution as interpreted in Witherspoon v. Illinois, 391 U.S. 510 (1968)?

(2) Did the exclusion from jury service at the guilt stage of a bifurcated trial of prospective jurors unwilling to consider the death penalty deny petitioner's right to trial by a representative jury drawn from a fair cross-section of the community guaranteed by the Sixth Amendment to the United States Constitution?

(3) Did the Supreme Court of Missouri adopt such a vague and broad construction of the statutory aggravating circumstances charged in affirming a sentence of death imposed upon petitioner by a jury which found, as instructed by the trial court, that

> [Petitioner], as an agent or employee of [another] and at his direction murdered [the victim],
>
> and that
>
> The murder . . . involved depravity of mind and that as a result thereof it was outrageously or wantonly vile and inhuman,

as to violate the Eighth and Fourteenth Amendments to the United States Constitution as construed by this Court in Godfrey v. Georgia, 446 U.S. 420 (1980)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

Missouri statutory provisions involved: Sections 565.001, 565.006, 565.008, 565.012 and especially subsections .2(6) and .2(7) thereof, and 565.014. Missouri Revised Statutes (1978).

Georgia Statutory provision involved: Section 27.2534.1(b)(7). Georgia Code Annotated (1977).

Missouri Constitution of 1945, Article I, Section 18 (a).

STATEMENT OF THE CASE

On October 23, 1978, an Information was filed in the Circuit Court of Cass County, State of Missouri, charging the petitioner herein with Capital Murder, a crime punishable by death or life imprisonment. On July 5, 1979, the State of Missouri filed a Notice of intent to seek the death penalty upon the following grounds as aggravating circumstances: that petitioner caused or directed another to commit capital murder or "committed capital murder as an agent or employee of another," and that "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

After a change of venue, petitioner was found guilty by a Springfield, Greene County, Missouri jury on September 15, 1979. On the same day, the second stage of the bifurcated trial was commenced to consider punishment on the capital murder charge. The jury was instructed that pursuant to Section 565.012.2, R.S.Mo., they could return a sentence of death only if the State proved the existence of at least one of two alleged aggravating circumstances beyond a reasonable doubt. Neither party offered any evidence and the jury, after argument and due deliberation, found, as instructed by the trial court, that the defendant, "as an agent or employee of Stephen Gardner and at his direction, murdered Karen Keeton," and that "the murder of Karen Keeton involved depravity of mind and that as a result thereof it was outrageously or wantonly vile and inhuman. The jury fixed petitioner's punishment at death. The Missouri Supreme Court suspended execution of the sentence pending the within proceedings.

Petitioner was convicted on evidence presented that the victim was brought to him as a "birthday present" at his home by petitioner's co-defendant; that thereafter petitioner tapped the victim on the head with a sawed-off shotgun and took her to an upstairs bedroom of his home where, petitioner, followed later by two other males, engaged in sexual activities with her; that petitioner's co-defendant told him to "Kill the bitch" before leaving the home; and that sometime later, petitioner strangled the victim with his hands.

Petitioner thereafter filed a timely Motion for New Trial which was overruled by the trial court on November 9, 1979. Petitioner then filed a timely Notice of Appeal in which appeal the Missouri Supreme Court, on May 11, 1981,

in a 5 to 2 decision, affirmed petitioner's conviction and sentence of death. Petitioner's timely filed Motion for Rehearing was denied on June 4, 1981.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to consider:

1. Whether petitioner's Sixth and Fourteenth Amendment rights were violated by the exclusion for cause of prospective jurors who expressed hesitancy or conscientious scruples against the infliction of capital punishment.

2. Whether the cross-section requirement of the Sixth Amendment was violated by the exclusion of prospective jurors unwilling to consider the death penalty from the guilt stage of petitioner's bifurcated trial.

3. Whether the Missouri Supreme Court construed the Section 565.012.2(6) aggravating circumstance so broadly in affirming petitioner's death sentence as to violate petitioner's Eighth and Fourteenth Amendment right to protection of law against cruel, arbitrary and capricious sentencing procedures.

4. Whether the Missouri Supreme Court construed the Section 565.012.2(7) aggravating circumstance so broadly in affirming petitioner's sentence of death and in the same manner this Court held to violate the Eighth and Fourteenth Amendments in Godfrey v. Georgia, 446 U.S. 420 (1980).

5. Whether the statutory death sentence review conducted by the Supreme Court of Missouri in this case was so superficial as to be violative of petitioner's rights under the Fourteenth Amendment.

ARGUMENT

THE EXCLUSION FROM JURY SERVICE OF PROSPECTIVE JURORS VIOLATED THE HOLDING IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

Petitioner was sentenced to death by a jury from which at least five prospective jurors were excluded on the basis of general and ambiguous responses given to the State of Missouri's death-qualifying questions. The trial court stated that it would recognize the test for qualifying a juror on the death penalty set out in Davis v. Georgia, 429 U.S. 122 (1976). The prosecution generally inquired as follows: "If, during the trial of this case the facts and circumstances were developed that in fact the jury could consider capital punishment, would you, as a juror, consider capital punishment as a possible alternative?" To this question, venireman Bumgarner responded, "I don't think so." This answer resulted in the following:

Q. Are you morally and religiously opposed to capital punishment?

A. Yes.

Q. And you feel you couldn't bring back a sentence of--the death sentence under any circumstances?

A. I don't think so.

Q. So regardless of how severe and aggravated the circumstances are, you don't feel that you could bring back a death penalty?

A. I don't believe I could.

No further questions were asked and the State's challenge for cause was sustained by the trial court over defense objections that his exclusion would violate petitioner's right under the Sixth Amendment to the United States Constitution to a representative jury drawn from a cross section of the community. The assignment of error here alleged was first raised by petitioner in his Motion for New Trial.

The Missouri Supreme Court, in affirming petitioner's sentence of death, held that Mr. Bumgarner's exclusion from jury service did not violate the constitutional principles of Witherspoon because (1) the phrase, "I don't think so", is "common vernacular to express a negative"; (2) the trial court understood the limited excuse; (3) the trial court possessed the ability to observe the tenor

of the questioning; and (4) lay persons are frequently reluctant to communicate their deep-seated opinions in a cogent and emphatic manner. In light of the foregoing, the Missouri Supreme Court held that each of the five excused venire persons made it "unmistakably clear" that they would not impose the death penalty under any circumstances and therefore the requirements of Witherspoon v. Illinois, supra, were met. This conclusion by the Supreme Court of Missouri is erroneous and not in accord with this Court's decisions.

In Witherspoon v. Illinois, 391 U.S. 510 (1968) defendant was tried pursuant to a statute which vested the jury with discretion as to whether a defendant convicted of first degree murder should be sentenced to death or life imprisonment. At the time of the defendant's trial, the applicable Illinois statute permitted a challenge for cause of any juror who stated that he had conscientious scruples against capital punishment or that he opposed it. The trial court excluded 47 veniremen based on their views toward the death penalty, including 39 who were not questioned as to whether their views would invariably compel them to vote against the death penalty. In reversing the death penalty imposed by this jury, the Supreme Court held that the death penalty can never be carried out

> . . .if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected . 391 U.S. at 522-23.

In a footnote, the court amplified this holding by stating that veniremen

> cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion. 391 U.S. at 522 n.21.

This Court went on to clarify the intended scope of this language by adding that its decision has no bearing on a State's power to exclude veniremen who

make it

> . . .unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. 391 U.S. at 522-23 n.21.

Moreover, it is clear that in deciding whether a venireman has been properly excluded, any ambiguity which casts doubt upon whether he has made his views unmistakably clear must be resolved against exclusion. While reversing for a violation of Witherspoon, the Fifth Circuit noted and applied this principle:

> The Supreme Court further implied that doubts concerning the ability of a venireman to subordinate his personal views to his oath as a juror to obey the law of the state should be resolved against exclusion, stating in footnote 9, on page 515-516 of the opinion, 88 S.Ct. on page 1774:
>
> > "Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that this is his position." (Emphasis added.) Marion v. Beto, 434 F.2d 29, 31 (5th Cir. 1970).

In footnote 4 to the opinion, the Fifth Circuit noted that "[t]hese words were emphatically repeated" in Boulden v. Holman, 394 U.S. 478 (1969) and Maxwell v. Bishop, 398 U.S. 262 (1970).

In Boulden v. Holman, 394 U.S. 478 (1969) and Maxwell v. Bishop, 398 U.S. 262 (1970) the Court applied Witherspoon to disallow exclusion of veniremen who said they did not "believe in capital punishment" or expressed "conscientious scruples", or "fixed opinions" against its infliction but did not unequivocally state that they would refuse to vote for its imposition in any case. In Boulden, the Court spelled out the basis for Witherspoon's application in these cases:

> [I]t is entirely possible that a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law - to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case. 394 U.S. at 483-84.

In Maxwell, the Court considered a transcript including the following exchanges with three veniremen:

> "Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capital punishment that might prevent you from returning such a verdict?"

"A. I think I do." (Emphasis supplied.)

. . . .

"Q. Do you entertain any conscientious scruples about imposing the death penalty?"

"A. Yes, I am afraid I do."

. . . .

In remanding the case to the state courts, this Court stated that it appears "that the sentence of death imposed upon the petitioner cannot stand under Witherspoon v. Illinois." Id. at 266.

Applying the holding of Boulden and Maxwell, the Court reversed several cases in which excluded veniremen stated they did not believe in the death penalty but did not unequivocally state that they would absolutely refuse to vote for its imposition in any case. Ladetto v. Massachusetts, 536 Mass. 541, 254 N.E.2d 415 (1969) rev'd 403 U.S. 947 (1971) ("strong feelings against the death penalty"). Turner v. Texas, 462 S.W.2d 9 (Tex. Cr. App. 1969) rev'd 403 U.S. 947 (1971) ("just don't believe" in the death penalty). And the Court made it clear that veniremen cannot be excluded where they gave an ambiguous response in reply to a question relating to their capability to impose the death penalty. Segura v. Patterson, 402 F.2d 249 (10th Cir. 1971) rev'd 403 U.S. 946 (1971) ("I don't think I can bring in the death penalty"); Funicello v. New Jersey, 52 N.J. 263, 245 A.2d 181 (1968) rev'd 403 U.S. 948 (1971) ("I don't think so"; "unsure" as to capability of voting for death penalty). Pemberton v. Ohio, ___ Ohio App.2d ___, ___ N.E.2d ___ (1969) rev'd 403 U.S. 947 (1971) (venireman "would try" to discharge duty; "I don't think I can vote for death penalty"; opposed to capital punishment in "practically" all cases).

The Missouri Supreme Court misconstrued this Court's decision in Adams v. Texas, ___ U.S. ___, 65 L.Ed.2d 581 (1980) which it erroneously cited as authority supportive of its view that Mr. Bumgarner and the four other venire persons' responses to Missouri's death-qualifying questions made it "unmistakably clear" that their exclusion from jury service did not violate the Witherspoon holdings.

This Court in Adams identified seven prospective jurors as having been unconstitutionally excluded, 65 L.Ed.2d at 592, n.7 & n.8, but the voir dire exam-

ination of these prospective jurors was not described in any detail. Two such persons were singled out by this Court, George Ferguson and Dorothy G. Riddle, and their detailed responses are extremely significant to the instant case.

Mr. Ferguson is identified in the Adams opinion as one of those venire members who were unconstitutionally excluded because they "stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." 65 L.Ed.2d 592. Although this is an accurate description of some of his statements, Ferguson also said the following when initially asked about his views on capital punishment:

Q. (By the prosecutor) All right, Do I take it from that you're opposed to capital punishment?

A. Yes, I am.

Q. And have you been opposed to capital punishment most of your life?

A. Yes, I have.

Q. And I take it you have strong feelings on that point, don't you?

A. Well, pretty strong. Of course, you know, someone -- if in self defense, I wouldn't have any feelings about it, I would do it, but otherwise, I do.

Q. I'm talking about the legalized execution. I'm talking about legalized -- in other words, placing someone in an electric chair and running electricity through his body.

A. I don't think I want to do that.

Q. And I take it from what you have said, that you personally just flat, because of the way you feel, could not be involved in that yourself?

A. It would be too hard for me to do. Now, I'm not going to say that I might not see enough that would convince me, but at that point, I would say it would be almost impossible that I should say, kill somebody.

Q. And so -- well, your feelings on the subject, I take it, are strong enough that you have grave doubts in your mind that you would never vote for death?

A. I believe so.

Q. All right. Do you think there is conceivably ever a case that you personally would ever take pen in hand and sign your name to a death warrant?

A. I don't believe so.

Q. You don't think you could ever do that?

A. I don't believe so.

Q. Are you then really flat opposed to the death penalty to the extent where you would automatically have to vote against it in order to be straight with your conscious?

A. With my conscious, yes.

Q. You would have to automatically vote against that?

A. Yes.

Tr. at 614-16 (emphasis added)

In response to subsequent questioning by the prosecutor, Ferguson reverted to the more equivocal language of his earlier answers:

A. But as far as voting for the death penalty, I wouldn't want to do that.

Tr. at 618.

Q. . . .From what you have told me earlier, I got the distinct impression if you were forced to answer those questions, if you were forced to deliberate on death, that you personally just could never be a person who could do that?

A. It would be hard.

Q. And I know what you mean when you say it would be hard, but I actually have to carry it a step further and just ask you; you had said earlier you would automatically have to vote against death and I take it that's the way you honestly feel?

A. At this point, I think it is.

Tr. 619-20.

A. I think it would be troublesome to me.

Q. And you're afraid it would affect you to the extent that you could not in good conscious ever consider the sentence of death, whether you arrived at it directly or indirectly?

A. I don't believe I could.

Tr. 621.

The prosecution moved for exclusion for cause under Witherspoon "and under the oath, 12.31," which was sustained without delineation of the ground for exclusion.

Mrs. Dorothy G. Riddle is identified in the Adams opinion as one of those venire members who were unconstitutionally excluded "only because they were unable positively to state whether or not their deliberations would in any way be 'affected.'" 65 L.Ed.2d at 592. While this is an accurate description of one of Riddle's statements, she also said the following:

Q. (By the prosecutor) You tell me how you feel at this point.

A. Well, I guess I feel that I do believe in it.

Q. Sure.

A. But of course, the way I feel right now -- it would be a big -- it would be hard for me to do it, and then I wonder how I would feel afterwards.

Q. Some people it would just -- some people it would just -- it would just violate their conscience.

A. Uh huh.

Q. And this we don't want to do, and that would be unfair to you and it would be unfair to those of us who participated in the case, certainly unfair to the Defendant.

So, I just -- I will ask you the question again. Do you feel like you could personally serve on this jury, and if the facts and circumstances called for it, make decisions, personally make decisions that would result in this man's death?

A. I would just say no.

Tr. 4928-29 (emphasis added).

Mr. Bumgarner's responses do not contain the degree of definiteness found in those of Mr. Ferguson and Mrs. Riddle which this Court held to lack that degree of clarity required constitutionally to support the exclusion of a prospective juror from service in a capital case. The only ground for proper exclusion is an "unmistakably clear" statement that the venireman will automatically vote against the death penalty. Where the statement can have any other connotation,

or where it is not obvious that the venireman understood the questions asked about his scruples in relation to his duty to consider all penalties, any exclusion is improper.

Missouri Supreme Court Judge Seiler, in his dissenting opinion filed in this case, observed that,

> Bumgarner's view on the subject was left hanging in the air, unresolved. The Witherspoon test was not satisfied as to Bumgarner. If the prosecutor does not get an unequivocal response, then he is not entitled to have the venireman dismissed for cause. Cf. Adams v. Texas, 448 U.S. 38, ___, 100 S. Ct. 2521, 2528-29 (1980) in which the Supreme Court said:
>
> > [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever that being presented with the option to give death penalty would have on the prospective juror] is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (emphasis supplied).
>
> * * * *
>
> [W]hile I would agree that when someone says "I don't think so" he may intend to express the negative, he may also mean that he is not sure. At best, it is equivocal, ambiguous, and uncertain. Bumgarner did not say that he would not be able to decide the issues on the basis of the law and evidence. We are talking about taking defendant's life by judicial order. In such circumstances, it is not the proper duty or function of the trial court or this court to "interpret" such a phrase by resolving the doubt in favor of the state. . .and the United States Supreme Court has declared that
>
> > "Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment. . .it simply cannot be assumed that that is his position." (emphasis supplied) 391 U.S. at 516 n.9.

It is clear that the principles of Witherspoon cannot be avoided by the good intentions of the trial judge or the lack of specificity in the veniremen's statements. Where there has been an improper exclusion, the judgment cannot be preserved merely because the "totality of the record" or the voir dire examination as a whole did not "violate the spirit of Witherspoon." Speck v. Illinois, 41 Ill.2d 177, 242 N.E.2d 208 (1968) rev'd. 403 U.S. 946 (1971); Jaggers v. Kentucky, 439 S.W.2d 580 (Ky.Ct.App. 1968) rev'd. 403 U.S. 946 (1971); Harris v. Texas, 457 S.W.2d 903 (Tex.Cr.App. 1970) rev'd. 403 U.S. 947 (1971); Adams v. Washington, 76 Wash.2d 650, 458 P.2d 558 (1969) rev'd. 403 U.S. 947 (1971). Likewise, the fact that the trial judge was able to see and hear veniremen does not prevent a reversal where the veniremen's responses on the cold record

are equivocal. Aiken v. Washington, Wheat v. Washington, 75 Wash.2d 421, 452 P.2d 232 rev'd. 403 U.S. 946 (1971).

Mr. Bumgarner and four other prospective jurors (Rosalie M. DeLange, Elston Dalton, Juanity Bishop and Priscilla Choate) were improperly excluded from service in petitioner's jury in violation of the holdings in Witherspoon v. Illinois, supra. (The complete text of their voir dire examinations is included in the Appendix). Petitioner's sentence of death and the Missouri Supreme Court's decision permitting prospective jurors to be excluded from service in capital cases on a broader basis than that allowed by Witherspoon cannot be permitted to stand.

Where the question of life or death is and will continue to be vested in the discretion of jurors selected in capital cases in the State of Missouri, this Court should grant certiorari to confine Missouri's capital penalty scheme to those bounds established in the Sixth, Eighth and Fourteenth Amendments to the United States Constitution as construed by this Court in Witherspoon and its progeny.

EXCLUSION OF PROSPECTIVE JURORS FROM SERVING AT THE GUILT STAGE OF PETITIONER'S BIFURCATED TRIAL BECAUSE OF THEIR UNWILLINGNESS TO CONSIDER THE DEATH PENALTY VIOLATED PETITIONER'S RIGHT UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO A TRIAL BY A JURY REPRESENTATIVE OF A FAIR CROSS-SECTION OF THE COMMUNITY.

Fifteen prospective jurors, including the five persons petitioner herein contends were improperly excluded under Witherspoon, were successfully challenged for cause on the basis of their responses to the prosecution's death-qualifying questions during voir dire. We submit that such prospective jurors constitute a "cognizable class" exclusion of which is a violation of the Sixth Amendment to the United States Constitution. This issue was raised by petitioner during voir dire.

In Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court held that the Sixth Amendment right to a jury trial was applicable to the states through the due process clause of the Fourteenth Amendment. Since Duncan, it has become

clear that a defendant is guaranteed an impartial jury drawn from a representative cross-section of the community. (Duren v. Missouri, 439 U.S. 357 (1979); Ballew v. Georgia, 435 U.S. 223, 236-237 (1978); Taylor v. Louisiana, 419 U.S. 522 (1975); Peters v. Kiff, 407 U.S. 493, 502-504 (1972); Williams v. Florida, 399 U.S. 78, 110 (1970)).

In Taylor v. Louisiana, supra, the court held that under the Sixth Amendment a male criminal defendant had standing to challenge the exclusion of women from his trial jury, and that the exclusion was improper even in the absence of any specific showing of prejudice, because the removal of such a large and distinctive group in the population "deprived him of the kind of factfinder to which he was constitutionally entitled." (Id., at 526.)

> "We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. [Citation.] This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. . . ." (Id., at 530.)

The fair cross-section requirement extends beyond race discrimination and prohibits all exclusions of identifiable segments of the community. In Hernandez v. Texas, 347 U.S. 475 (1954), (a race discrimination case) the Supreme Court explained: "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. . . ." (347 U.S. at 478.) But, the court added, racial groups are not the only ones at issue: "Whether such a [cognizable] group exists within a community is a question of fact." (Ibid.)

In Peters v. Kiff, supra, the proposition that improper exclusion raises constitutional questions only when the gravamen of the exclusion is racial was again firmly rejected. The petitioner in Peters, a white man, challenged the systematic exclusion of blacks from his grand and petit juries. The plurality of the court recognized that the damage caused by such exclusionary practices is not restricted to particular issues or to a particular race:

"Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varities of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude,as we do, that their exclusion deprives the jury of perspective on human events that may have unsuspected importance in any case that may be presented." (407 U.S. at 503-504, opn. of Mr. Justice Marshall.)

Considerations similar to those mentioned regarding race and sex have led state and federal courts to condemn systematic exclusion of daily wage earners, Thiel v. Southern Pacific Co., 328 U.S. 217, 222-224 (1946); Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966);common laborers, Simmons v. State, 188 So.2d 442 (Fla.Ct.App. 1966); students, People v. Attica Brothers,359 N.Y.S.2d 669 (N.Y. Sup.Ct. 1974); and atheists and agnostics, Schowgurow v. State, 213 A.2d 475 (Md.Ct.App. 1965); State v. Madison, 213 A.2d 880 (Md.Ct.App. 1965).

This Court in Duren v. Missouri, 439 U.S. 357, 364 (1979) held that,

"In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."

There is no requirement that the defendant be a member of the excluded group, or that he establish that he was in any special way prejudiced by the exclusion. Moreover, the exclusion must be "systematic" only in the sense that it is "inherent in the particular jury-selection process utilized " (Id., at 366), i.e.,that it was "due to the system by which juries were selected," (Id., at 367, emphasis in original) and not the product of chance. There is no need to show that the group in question was intentionally excluded or purposefully excluded:

". . . in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement on the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement." (Id., at 368, n. 26.)

The facts necessary to affirmatively resolve the question in the present case of whether a particular group is cognizable were presented to the California

Supreme Court in Hovey v. Superior Court, 28 Cal.3d 1 (1980) which exhaustively reviewed studies detailing the characteristics of potential jurors who are excluded from capital cases because of their unwillingness to consider imposing the death penalty. The court discussed four separate attitudinal studies, all of which show that the excluded opponents of the death penalty have a distinctive set of attitudes on issues concerning criminal justice, an outlook that sets them apart from the rest of the population. Hovey, at 43-54. The court described the findings of each of these studies, ending with the most recent -- the Ellsworth Attitude Survey -- about which the court stated: "The methodology of this survey was universally praised by the experts [on both sides] below." Id., at 50.

The attitudes studies in the Hovey survey concerned such issues as the defense of insanity, the right of a defendant to remain silent, and the relative trustworthiness of the attorneys for the defense and the prosecution. The court paid particular attention to evidence -- including experimental data in addition to the attitudinal surveys -- that the excluded jurors have a different concept of "reasonable doubt" than the remainder of the jury pool. Id., at 57-59. Similarly, the court described experimental data that shows the excluded class of jurors to be relatively more likely to believe defense witnesses and relatively less likely to accept prosecution testimony. Id., at 59-60.

The court also reviewed a long series of "conviction-proneness" studies, (those measuring differences in the voting behavior of death-qualified and excluded jurors) conducted over a period of two decades. In discussing the various conviction-proneness studies, the court described the consistency between the new studies and the older studies that used a pre-Witherspoon definition of death-qualification, and found that this consistency validated the old studies as probative on the effects of death-qualification in the post-Witherspoon era. Id., at 36 fn. 72; 41, fn. 79. The court noted the absolute regularity of the findings of these studies, their combined statistical impact, and the fact that no studies reaching contrary conclusions were presented by the prosecution. Id., at 40,41.

Jurors who are excluded for opposition to the death penalty are a "large and

identifiable segment of the community." Peters v. Kiff, supra, opn. of Justice Marshall, at 503. The distinctiveness of their attitudes and perspectives -- indeed, of their behavior as jurors -- is exhaustively documented in Hovey. The traditional requirements for holding them to be a "cognizable class" are easily met. Particularly illuminating is the uncontradicted expert testimony that the relationship between death penalty attitudes and propensity to convict is "robust" -- a strong, empirically documented relationship that will show up regardless of the exact criteria of attitudes toward the death penalty, regardless of the population examined, and regardless of who examines the issue, when, where, or how. Hovey, supra, at 40-41.

The Hovey Court found further that the distinctive attitudes associated with opposition to the death penalty vary in strength in proportion to the strength of the opposition to capital punishment. Id., at 44, 48-49. In its discussion of the legal concept of neutrality, the Hovey court defined a neutral jury as one representing the entire range of viewpoints in the community. Id., at 19-20.

Not only do the excluded venirepersons constitute a cognizable group because of the constellation of beliefs and experiences which they share, but their exclusion would also impermissibly affect the relative proportions of other cognizable groups available to sit on a capital jury. The Hovey court discussed an extensive series of polls, all of which show that blacks and women oppose the death penalty more than whites and men, and that they are disproportionately excluded by death-qualification. The court endorsed these findings, ending its discussion with the observation that no one who ever did a study on this issue has failed to find these differences. Id., at 57.

Once exclusion of an identificable group is established, the only remaining inquiry is "whether the exclusion might be found to have sufficient justification." Peters v. Kiff, supra, at 500, fn. 10.

In Taylor v. Louisiana, supra, the Supreme Court held that "The right to a proper jury cannot be overcome on merely rational grounds. There must be weightier reasons. . . ." 419 U.S. at 534. The state must demonstrate that

> ". . . a significant state interest . . . [is] manifestly and primarily advanced by those aspect of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group." Duren v. Missouri, supra, 439 U.S. at 367-368.

The state, then, "bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." Id., at 368.

Mr. Justice Stewart, speaking for the Court in Witherspoon, noted "the possibility of accomodating both ["the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment [and] . . . the defendant's interest in a completely fair determination of guilt or innocence"] . . . by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment." 391 U.S. at 520, fn. 18.

Missouri Revised Statutes Section 565.006 embodies a legislative preference for having a single jury hear both phases of capital trials. Although this preference may not be arbitrary (see People v. Washington, 71 Cal.2d 1061, 1089 (1969)), mere lack of arbitrariness, or even specific considerations of administrative convenience or monetary saving, cannot justify a procedure that deprives a capital defendant of a fundamental Sixth Amendment right. Taylor v. Louisiana, supra, 419 U.S. at 535; Duren v. Missouri, supra, 439 U.S. at 368. This Court has held that "the cost of protecting a constitutional right cannot justify its total denial." Bounds v. Smith, 430 U.S. 817, 825 (1977).

The State of Missouri has no legitimate judicial or prosecutorial interest in preserving the present form of death-qualification. Petitioner concedes to the State the right to qualify jurors concerning their ability to consider a death sentence at the penalty trial. The State's interest in obtaining a capital sentence in an appropriate case is fully recognized. Petitioner also concedes the State's right to exclude from juries at the guilt phase all venirepersons who make "unmistakably clear . . . that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, 391 U.S. 510, 522 n. 21 (1968) (emphasis in original). Thus, the State's interest in a fair trial of the issue of guilt or innocence is also fully recognized.

> Under the Missouri Constitution, art. I, § 18(a), defendant is entitled to trial by an impartial jury. This is an absolute right. There are no qualifications or exceptions to it. The state is not entitled to the death penalty against this defendant as a matter of right. All it is entitled to is a jury which will consider the death penalty, assuming guilt has been determined, (emphasis added). I do not believe challenges for cause at the outset of the trial are valid unless the prospective juror declares that his views on capital punishment are such as would prevent him from making an impartial decision as to defendant's guilt. It does not follow that persons opposed to the death penalty are necessarily thereby unable to make an impartial decision as to defendant's guilt. But that was never determined here - the prospective jurors were excluded simply because they would not vote for the death penalty.
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> * * * * *
>
> This error in excluding prospective jurors who were not shown to be incapable of making an impartial decision as to guilt or innocence requires that the cause be reversed and remanded. (Dissenting opinion of Missouri Supreme Court Judge Seiler, pp. 4-5, included in the Appendix herein).

In the premises, we submit that the exclusion from service during the guilt stage of petitioner's capital trial of prospective jurors unwilling to consider the death penalty is unconstitutional under the Sixth Amendment to the United States Constitution. We believe that the question presented herein is one of first impression which is of such grave and fundamental importance that this Court should grant certiorari to resolve the issue.

IN AFFIRMING PETITIONER'S DEATH SENTENCE, THE MISSOURI SUPREME COURT APPLIED THE SAME VAGUE AND BROAD CONSTRUCTION, HELD TO BE UNCONSTITUTIONAL BY THIS COURT IN GODFREY V. GEORGIA, 446 U.S. 420 (1980), TO TWO STATUTORY AGGRAVATING CIRCUMSTANCES.

Under Missouri's death penalty scheme, a person convicted of capital murder can not be sentenced to death unless it is found beyond a reasonable doubt that at least one of ten aggravating circumstances provided by statute exists and is not outweighed by any statutorily provided mitigating circumstances. Missouri Revised Statutes Section 565.012 (1978). The court is required to impose the sentence fixed by the jury. Section 565.006.2, R.S.Mo., 1978.

The two aggravating circumstances in question are contained in Missouri Revised Statutes Section 565.012 (1978). Subsection .2(6) reads, in pertinent part, "The offender . . . committed capital murder as an agent or employee of another person." Subsection .2(7) reads, "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

With respect to subsection .2(7), however, the jury were instructed only to find and they did find that

> The murder . . . involved depravity of mind and that as a result thereof it was outrageously vile and inhuman.

This Court, in Godfrey v. Georgia, 446 U.S. 420 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980), reversed a sentence of death which was based wholly on an aggravating circumstance framed in the very language approved by the Missouri Supreme Court to affirm petitioner's death sentence.

In Godfrey, petitioner was charged with two counts of murder for the shotgun slaying of his wife and his mother-in-law. He was also charged with aggravated assault for having struck his 11-year old daughter on the head with the barrel of his shotgun. The single aggravating circumstance submitted to the jury quoted the statutory language of Georgia Code Annotated Section 27.2534.1 (b)(7) in its entirety. The jury imposed sentences of death on both of the murder convictions. As to each, the jury specified that the aggravating circumstance they had found beyond a reasonable doubt was "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." The Court stated that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' " Godfrey v. Georgia, supra, 100 S.Ct. at 1765. The Court vacated Godfrey's sentences of death because "the trial judge's sentencing instructions . . . gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact", the Court continued, "the jury's interpretation of § (b)(7) can only be the subject of sheer speculation." Id., at 100 S.Ct. 1765.

The majority of the Missouri Supreme Court concluded that Godfrey was decided on the basis that the Georgia Supreme Court applied a valid instruction to a legally sufficient jury finding of an aggravating circumstance unsupported by the factual details of the offenses from which the defendants crimes could not

> be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma.

> Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes. (Higgins, J., citing Godfrey v. Georgia, supra, 100 S.Ct. at 1767)

This narrow conclusion ignores the reasoning and substantive holdings of this Court.

> If a State wishes to authorize capital punishment,
>
> [I]t has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." Gregg v. Georgia, supra, 428 U.S., at 196, n. 47, 96 S.Ct. at 2936, n. 47. See also Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929. It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, supra, 100 S.Ct. at 1764-65.

Missouri, however, expressly declines either to tailor its law or to define the crimes for which death may be the sentence in a way that obviates standardless sentencing discretion. Instead, the Missouri Supreme Court limits its capital review in a selective and post hoc manner. For example, in affirming petitioner's death sentence, the Court relies heavily on Georgia decisions to validate subsection .2(7) as well as the partial submission of .2(7) to the jury which imposed the penalty. But, at the time petitioner's case was reviewed, the Georgia Supreme Court had already held this proposition to be insufficient to support a sentence of death. Holton v. State, 243 Ga. 312, 253 S.E.2d 736, cert. denied, _____ U.S. _____, 100 S.Ct. 263, 62 L.Ed. 2d 181 (1979); Godfrey v. Georgia, supra, 100 St.Ct. at 1775 (dissenting opinion of Mr. Justice WHITE and Mr. Justice REHNQUIST). Moreover, the Godfrey Court reviewed capital decisions of the Georgia Supreme Court and approved its narrowing constructions of subsection (b)(7) as, "depravity of mind . . . is that which results in torture or aggravated battery to the victim" and is that which comprehends "only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim." Id., at 1766.

Since Missouri's capital penalty scheme is patterned after Georgia's, the Missouri Supreme Court assumes it, too, was validated by this Court in its decision in Gregg v. Georgia, 428 U.S. 153 (1976) which upheld Georgia's death

penalty scheme. But there appear serious and critical distinctions between Georgia's and Missouri's statutes. Georgia's subject aggravating circumstance contains limiting terminology absent from Missouri's subsection .2(7) (terminology absent appears underscored in the following), viz.:

> The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Ga. Code Ann. Section 27.2534.1(b)(7) (1977).

An understanding of the proper application and construction of this limiting terminology serves as another serious point of departure between the States.

> It is perfectly evident, moreover, that, in exercising its review function, the Georgia Supreme Court understood that the provision applied in its entirety, just as in the past it has insisted that the provision be read as a whole and not be applied disjunctively. (citations omitted). Godfrey v. Georgia, supra, at 1775 (dissenting opinion of Mr. Justice WHITE).

In approving the (b)(7) aggravating circumstance instruction read to the jury in Godfrey, the Georgia Supreme Court remained consistent with its practice noted above. By way of contrast, however, the Missouri Supreme Court in affirming petitioner's death sentence approved both, the reading of an instruction to the jury which was based on a partial and insufficent rendition of Missouri's subsection .2(7) aggravating circumstance, and the finding by the jury thereof in words specifically found by this Court to be insufficient to support a death sentence in Godfrey.

The Missouri Supreme Court's approval of the second aggravating circumstance in question, subsection .2(6), that petitioner "committed murder as an agent or employee of another," was based solely upon the statement made to petitioner by his co-defendant to "Kill the bitch," followed subsequently by her strangulation despite evidence the murder was committed to avoid prosecution.

Missouri Revised Statutes Section 565.014 legislatively commands the Supreme Court to review any case wherein the death penalty is imposed.[1] In its review, the Missouri Court upheld the jury's finding of the subsection .2(6) aggravating circumstance, but demurred in a footnote, stating that

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1 3. With regard to the sentence, the supreme court shall determine:
(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

in Georgia,

> Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance * * * does not taint the proceedings so as to invalidate the other aggravating circumstance found and the sentence of death based thereon. (citations omitted) (n. 5, majority opinion by HIGGINS, J., Appendix, post).

This position is at odds with its legislatively-mandated responsibility to exercise its judgment in the capital penalty reviewing process. Instead, the Missouri Court defers to the judgment of the jury whose findings the Court is required to question.

Both subject aggravating circumstances are constitutionally infirm and the Missouri Supreme Court's construction of subsections .2(6) and .2(7) unconstitutionally broadens statutory provisions whose constitutional validity has not been established. We nonetheless address the question of taint.

In Stephens v. Zant, ___ F.2d ___ (11/26/80), the Fifth Circuit reviewed defendant's conviction and sentence of death imposed by a jury which found three or four aggravating circumstances submitted to them to be true. During the pendency of his state appeal, the Georgia Supreme Court, in Arnold v. State, 236 Ga. 534 (1976), determined that a statutory aggravating circumstance was unconstitutionally vague. One of the three aggravating circumstances charged against Stephens was invalidated thereby and the Georgia Supreme Court eliminated it from consideration of defendant's appeal and held that the sentence was not impaired. Relying on Stromberg v. California, 283 U.S. 359 (1931) (where a jury is instructed on several grounds, one of which proves to be unconstitutional, and the reviewing court cannot determine whether the jury relied on the unconstitutional ground, the verdict must be set aside), the Fifth Circuit vacated defendant's sentence of death on the ground that it is impossible "to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance"; the jury's discretion was thus not "sufficiently channeled,"; and the process in which the death penalty was imposed was not "rationally reviewable."

In our opinion, the Fifth Circuit has answered the question.

Petitioner's jury was granted license to apply its own standards to find that he committed murder as an agent or employee of a man by whom he was neither employed nor controlled; to find that he committed murder in a manner

the jury could decide warranted his life held in forfeit; and finally, to make the decision that he should die for whatever reasons each juror might have had, or for no reason at all, and the Missouri Supreme Court's decision approved the result in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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MISSOURI REVISED STATUTES

565.001 Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

565.006 1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment, and by their verdict ascertain whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument tothe jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be im-

posed by a jury or judge sitting without a jury, the additional procedure provided in section 565.014 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

565.008 1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

2. Persons convicted of murder in the first degree shall be punished by imprisonment by the division of corrections during their natural lives. Persons convicted of murder in the second degree shall be punished by imprisonment by the division of corrections for a term of not less than ten years.

565.012 1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider: (1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence, (2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence, (3) Any mitigating or aggravating circumstances otherwise authorized by law, and (4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether

a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions:

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

565.014 1. Whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court together with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

2. The supreme court of Missouri shall consider the punishment as well as any errors enumerated by way of appeal.

3. With regard to the sentence, the supreme court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

4. Both the defendant and the State shall have the right to submit briefs within the time provided by the supreme court, and to present oral argument to the supreme court.

5. The supreme court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to: (1) Affirm the sentence of death; or (2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Missouri in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

6. There shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital cases in which sentence was imposed after May 26, 1977, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant. The court shall be authorized to employ an appropriate staff, within the limits of appropriations made for that purpose, and such methods to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence. The office of the assistant to the supreme court shall be attached to the office of the clerk of the supreme court for administrative purposes.

7. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

MISSOURI CONSTITUTION OF 1945, ARTICLE 1, SECTION 18(a). That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.

APPENDIX B

GEORGIA STATUTES

Georgia Code Annotated Section 27.2534.1(b)(7) (1977) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Supreme Court of Missouri

en banc

DUPLICATE
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STATE OF MISSOURI,)
)
Plaintiff-Respondent,)
)
vs.) No. 61797
)
GEORGE MERCER,)
)
Defendant-Appellant.)

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable John C. Crow, Judge

George "Tiny" Mercer was convicted by a jury of capital murder, § 565.001, RSMo 1978; the jury fixed his punishment at death, §§ 565.008 and 568.012, RSMo 1978. Judgment was rendered accordingly. He charges errors to the excuse for cause of prospective jurors who voiced objections to consideration of the death penalty; the prosecuting attorney's reference in opening statement and a stipulation concerning a prior accusation of rape of another victim by defendant; and the cross-examination of defendant with respect to previously excluded evidence. In addition to the review for error, the Court will review the sentence as mandated by § 565.014, RSMo 1978. Affirmed.

I.

The evidence supports defendant's conviction for the murder of Karen Keeton, a 22-year-old white female, in the early morning hours of August 31, 1978. It established that defendant, a 34-year-old white male, was drinking with friends at the Blue Seven Lounge in Grandview, Missouri, the evening before. Karen was working there as a waitress. During the evening, defendant made the comment that he

would like to take her to bed. Steven Gardner, a friend of defendant who was acquainted with Karen, went up to the bar to talk to her. He returned a short time later and said he and Karen were going to breakfast and would go to defendant's house afterward. Defendant left with David Gee, another friend, and went to defendant's home in Belton, Missouri, arriving there around 12:30 a.m. John Campbell was at the house babysitting with defendant's ten-year-old daughter. A short time later Gardner and Karen Keeton arrived.

After visiting for some time defendant picked up a sawed-off double-barrelled shotgun, opened it to show the shells, walked over to Karen, tapped her on the head with the gun, and told her to "get her ass upstairs." When she hesitated he grabbed her and pushed her to the stairway. She yelled for Gardner to help. He responded, "Happy Birthday, Tiny," then turned to the others and said, "Seconds." Karen's dress was tossed downstairs with defendant telling Gardner to "put these clothes where they go, you know where they go." Gardner put the clothes in a closet and pocketed the money from her purse.

Defendant later came downstairs; he was naked and had an erection. Gardner went upstairs. Defendant drank beer for awhile, showered and returned to the table to dry himself at which time he remarked what "a good piece of ass" she was and that he was going to go back and "fuck her in the butt". Several minutes later, Gardner yelled for David Gee to come upstairs. Gee, followed by defendant and John Campbell, complied. Upstairs, defendant told Karen, who was lying naked on the bed, to undress Gee and "start sucking David Gee's dick." She performed as directed. After Gee answered, "Pretty good", to defendant's question about her performance, defendant said, "You leaky cunt, you'd better do it better." When asked how she was doing now, Gee answered, "Better now." Defendant, Gardner and Campbell returned downstairs. At this time, Karen stopped what she was doing, and Gee put his clothes on. Karen asked what was going to happen to her; Gee attempted to reassure her. When Gee returned downstairs, defendant told Campbell to get

upstairs so they would all be in it together. Campbell proceeded upstairs and found Karen unclothed. She cried, and Campbell talked with her, trying to console her. He too returned downstairs.

Defendant started upstairs again as Gardner was leaving. He asked Gardner what he wanted done with Karen and Gardner replied, "Kill the bitch." Defendant said, "Okay, brother." Gardner asked if he would need any help; defendant said no, he would get rid of the body where it would not be found. Gardner and Gee left, defendant went upstairs, and Campbell went to sleep downstairs.

Campbell was suddenly awakened by defendant calling his name from upstairs. He responded and found defendant straddling Karen's body with his hands on her throat. Defendant screamed at Campbell to take her pulse. Campbell grabbed the arm of Karen's seemingly lifeless body, and found a faint pulse. At the time he told defendant this, he could smell human waste which was all over the bed. Defendant "hollered", struck the left side of Karen's head, and said, "Die you bitch . . . This is a leaky cunt. Die." He continued strangling her, and again screamed at Campbell to take her pulse. Campbell found no pulse. When Campbell reported this, defendant got off the bed, grabbed Karen's legs, and pulled her off the bed. Defendant took the sheets and blanket to the washing machine and told Campbell to wipe the waste off the floor. Defendant came back and told Campbell to get his truck and put the tailgate down so he could put Karen in it. After Campbell complied, defendant brought the body down and put it in the truck. Campbell and defendant climbed in the truck and Campbell started driving at defendant's direction. Finally defendant had Campbell stop. Defendant got out and dumped the body over a fence into a field. When he returned he told Campbell, "Now, if I'd killed that leaky cunt 17-year-old like I did her . . . I wouldn't have been on any rape charges and things I'm on right now." At that time, defendant had a rape charge pending against him filed by a 17-year-old girl. Defendant and Campbell returned to defendant's house where defendant gave Campbell the shotgun to hide, and burned Karen's purse.

Three to four weeks later Campbell and his attorney looked for and found the badly decomposed body of Karen Keeton. They reported this to the authorities. The body was identified by means of her teeth.

II.

In Furman v. Georgia, 408 U.S. 238 (1972), the Court struck down Georgia's death penalty provisions holding that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner; the Court did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

Following the decision in Furman v. Georgia, supra, the Georgia legislature enacted a new death penalty scheme. In Gregg v. Georgia, supra, the Court held that this statutory system did not violate the Constitution. The Court stated:

> [T]he concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.

Id. at 195. The Georgia statute was found to meet this test.

The Missouri death penalty scheme is patterned after the Georgia scheme approved in Gregg v. Georgia, supra. Section 565.008, RSMo 1978, permits the death penalty for only those persons convicted of capital murder.[1] In a capital murder case defendant's guilt or innocence is determined in the first stage of a bifurcated trial. Section 565.006.1, RSMo Supp. 1980. Where the jury or judge returns a guilty verdict, a presentence hearing is held at which,

> [T]he jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty, or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the

[1] 565.001. Capital murder defined. -- Any person who unlawfully, wilfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

> defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed.

Section 565.006.2.

The judge is required to consider or to include in his instructions to the jury for it to consider any statutory aggravating or mitigating circumstances supported by the evidence, any mitigating or aggravating circumstances otherwise authorized by law, and,

> Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

Section 565.012.1 (4), RSMo Supp. 1980.

Unless one of the aggravating circumstances enumerated in § 565.012.2 is found, the death penalty cannot be imposed. Section 565.012.5. If the verdict is a recommendation of death, the jury must designate the aggravating circumstances which it found beyond a reasonable doubt. Section 565.012.4. The judge is required to impose the sentence fixed by the jury. Section 565.006.2.

If the death penalty is imposed, the sentence must be reviewed on the record by this Court. This Court is directed to consider the punishment as well as any errors raised on appeal, and to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
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> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and
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> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 565.014.3, RSMo 1978.

The Court must also include in its decision a reference to similar cases taken into consideration. Section 565.014.5. Upon review, the death sentence may be affirmed or set aside and the case remanded for resentencing by the trial judge based on the record and argument of counsel. Id.

After the jury found Mercer guilty of capital murder, no additional evidence was presented at the presentence hearing; both the state and defendant did, however, make additional arguments regarding punishment. The court instructed on and the jury found two aggravating circumstances:

> 1. Whether the defendant, as an agent or employee of Stephen Gardner and at his direction, murdered Karen Keeton. [Section 565.012.2(6)]
> 2. Whether the murder of Karen Keeton involved depravity of mind and that as a result thereof it was outrageously or wantonly vile and inhuman. [Section 565.012.2(7)]

The court also instructed the jury on the following mitigating circumstances:

> 1. Whether Karen Keeton was a participant in the defendant's conduct or consented to the act.
> 2. Whether the defendant acted under extreme duress or substantial domination of another person.
> 3. The age of the defendant at the time of the offense.
> 4. . . . [t]he absence of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant.

III.

A.

Appellant challenges the trial court's excuse for cause of fifteen prospective jurors who expressed conscientious opposition to the imposition of the death penalty. He contends the excuse of five such venire persons violated the constitutional standards of Witherspoon v. Illinois, 391 U.S. 510 (1968), because they were excused for voicing general objections to the death penalty. Appellant further contends the court's failure to adhere strictly to the Witherspoon v. Illinois standard of qualifying the jury precluded the constitutional application of Missouri's death penalty statutes to prevent the arbitrary and capricious use of jury discretion. In addition, he charges the excuse of the fifteen venire persons violated his constitutional rights to a trial by an impartial jury composed of a cross-section of the community.

In Witherspoon v. Illinois, supra, prospective jurors generally opposed to capital punishment had been excluded for cause from the jury that convicted defendant and sentenced him to death. The Court held that:

> A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

Id. at 522. The Court noted, however, that its decision did not prevent the execution of a death sentence where veniremen excluded for cause made it "unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." Id. at 522, n. 21. See also Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980); Davis v. Georgia, 429 U.S. 122 (1976); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969).

The parties were in agreement and the court understood that a venire person could not be excluded unless that person was, "irrevocably committed to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the trial." The state questioned each juror individually:

> If, during the trial of the case the facts and circumstances that come forth as evidence are such that under the law the jury could consider the death penalty, would you, as a juror, consider the death penalty?

The state would follow any negative answer by questioning whether the venire person could assess the death sentence under any circumstance.

The trial court sustained fifteen of the state's challenges for cause on the ground the venire persons were irrevocably committed against imposing the death penalty regardless of the circumstances. Appellant claims for the first time on appeal that five of these fifteen venire persons were equivocal in response to the state's questions. The pertinent examination of the five venire persons in question is contained in the appendix.

Review of the questions and answers indicates each of the five excused venire persons made it "unmistakably clear" that they would not impose the death penalty under any circumstances. Appellant presents the response of Harry Bumgarner as the most equivocal. His response, "I don't think so," is not equivocal in its context; it is common vernacular to express a negative. See State v. Pride, 567 S.W.2d 426, 433 (Mo.App. 1978). In light of the trial court's stated understanding of the limited excuse, its ability to observe the tenor of the questioning and the frequent reluctance of lay persons to communicate their deep-seated opinions in a cogent and emphatic manner, it can only be said that the requirements of Witherspoon v. Illinois, supra, were met.

Appellant's challenge to the excuse of all fifteen venire persons is actually two-fold. First, he argues that the excuse for cause violated his right under the sixth and fourteenth amendments to trial by a jury drawn from a representative cross-section of the community. Second, he argues the excuse for cause resulted in a jury that was not impartial on the issue of guilt; that it was prosecution-prone. Both of these arguments were rejected in State v. Mitchell, ___ S.W.2d ___ (Mo. banc 1981).

As in that case, there is no evidence to establish a prima facie violation of the fair cross-section requirement.[2] If such a prima facie case could be established, the state has a significant interest in impaneling only those jurors who have stated that they can follow the law. The exclusion of those venire persons who have stated unambiguously that they cannot, under any circumstances, consider a certain punishment permissible under the law does not violate representative cross-section requirements of the sixth and fourteenth amendments. Spinkellink v. Wainwright, 578 F.2d 582, 597 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). The right to a representative jury does

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[2] The three elements that establish a prima facie violation are: (1) the persons excluded from jury service must be members of a "'distinctive' group in the community"; (2) the representation of this group in venires is "not fair and reasonable in relation to the number of such persons in the community"; and (3) the underrepresentation is due to a "systematic exclusion of the group in the jury-selection process." Duren v. Missouri, 439 U.S. 357, 364 (1979).

not include the right to be tried by jurors who have explicitly indicated an inability to follow the law. Lockett v. Ohio, 438 U.S. 586 (1978).

In Witherspoon v. Illinois, supra at 516, petitioners maintained that a jury selected in the manner present in that case, must necessarily be biased in favor of conviction citing two surveys in support. See Witherspoon v. Illinois, supra at 517, n. 10. The Court found that the data presented was "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt," and declined to conclude that the "exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." Id. at 517-518. The Court refused to reverse the conviction. See also Bumpers v. North Carolina, 391 U.S. 543 (1968).

Following Witherspoon v. Illinois, supra, a number of studies were published on a theory that "death-qualified" jurors are not impartial on the issue of guilt.[3] These studies, however, are not conclusive, and this Court will not reverse defendant's conviction on the basis of the studies presented.

Those chosen to be jurors in no way indicated that they were biased for the prosecution or against the defendant; they indicated only that they would consider the death penalty if the law and facts permitted it. As stated in Sprinkellink v. Wainwright, supra at 594:

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[3] Defendant cites the following: V. Boehm, Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality; An Application of Psychological Measuring Techniques to the Problem of Jury Bias, 1968 Wisc. L. Rev. 734; E. Bronson, On the Conviction-Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. Colo. L. Rev. 1 (1970); F. Goldberg, Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law, 5 Harv. Civil Rights - Civil Liberties L. Rev. 53 (1970); E. Jurow, New Data on the Effect of a "Death Qualified Jury" on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971); M. Rokeach & D. McLellan, Dogmatism and the Death Penalty: A Reinterpretation of the Duquesne Poll Data, 8 Duquesne L. Rev. 125 (1969-70); W. White, The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries, 58 Cornell L. Rev. 1176 (1973) (reporting 1971 Harris Poll data); H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment (1968) published by the Center for Studies in Criminal Justice, University of Chicago Law School.

> [T]he veniremen indicated only that they would be willing to perform their civic obligation as jurors and obey the law. Such persons cannot accurately be branded prosecution-prone.

"A juror wholly unable to ever consider the death penalty no matter what the facts of a given case, would clearly be unable to follow the law . . . in assessing punishment." Adams v. Texas, supra at 2526. The state has a legitimate interest in administering its death penalty statute which permits it to bar from jury service those whose belief about capital punishment would lead them to ignore the law. Adams v. Texas, supra. See also State v. Mitchell, supra.

B.

In the state's opening statement the prosecuting attorney told the jury:

> We are back at the location where Karen Keeton's body was dumped, and Mercer says to Campbell: 'I wouldn't be in the trouble I'm in today if I'd killed that other bitch on the rape.'
>
> * * * *
>
> 'I was going to do it, but Bruce Miller talked me out of it.'
>
> Deborah Middleton will come here and testify. Deborah Middleton will tell you that she first met George Mercer on July 26th, 1978, and that basically an occurrence happened in which she later brought charges against George Mercer and before August 31st of 1978. She'll be here to testify.

Defendant objected and requested a mistrial which was denied. John Campbell later in the trial testified that after defendant had dumped the body:

> He got in the truck, and he said, 'Now, if I'd killed that leaky cunt 17-year-old like I did her,' he says, 'I wouldnt've been on any rape charges and things I'm on right now.'

Defendant objected to the calling of Deborah Middleton to testify about the rape charge she brought against defendant. The trial court ruled that Middleton could testify that she had made an accusation of rape against defendant prior to August 31, 1978 (the day of Karen Keeton's murder), provided the state did not go into the truth of the charge. Defendant then agreed to stipulate that:

On July 26, 1978, a 17-year-old female accused the defendant, George Mercer, of rape, and as a result of that accusation a criminal prosecution for rape was commenced against the defendant, George Mercer, prior to August 31, 1978.

Appellant now charges error to permitting the prosecutor to state in opening statement that Deborah Middleton would testify about her rape charge against the defendant, and argues he was forced to choose between having Deborah Middleton testify or entering into the stipulation. Appellant contends Deborah Middleton's testimony was inadmissible and therefore the stipulation and reference in opening statement were improper because there was no evidence that the person defendant referred to in his statement to John Campbell was Deborah Middleton, because the stipulation defendant was forced into agreeing to constituted proof of a separate and distinct crime for which defendant was not on trial, and because it constituted an attack upon defendant's character which had not been placed in issue.

In view of John Campbell's testimony concerning the defendant's statement after dumping Karen Keeton's body, Deborah Middleton's testimony, limited to the bringing of a rape charge against defendant prior to August 31, 1978, would have been admissible. Therefore the trial court did not err in permitting the prosecuting attorney to refer to this in his opening statement or in permitting the stipulation in lieu of her testimony.

Defendant denied the killing and sought to portray John Campbell as a liar. It was necessary for the state to establish defendant's motive, and to corroborate John Campbell's testimony. Defendant's statement to John Campbell was relevant as evidence of his motive in killing Karen Keeton; he killed her to avoid detection of the rape. Deborah Middleton's testimony would have explained defendant's statement and would have corroborated John Campbell's testimony - the state sought to prove that there was in fact a 17-year-old girl who had brought rape charges against defendant prior to the murder of Karen Keeton. The stipulation did not go into the facts leading to the charges or the disposition of those charges.

The admissibility of the stipulation is not affected by the lack of direct evidence establishing that Deborah Middleton was the girl referred to by defendant in his statement to John Campbell. Evidence need only be relevant, not conclusive. It is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issue. State v. Lee, 556 S.W.2d 25 (Mo. banc 1977), vacated on other grounds, 439 U.S. 461 (1979). Nor is this otherwise relevant evidence on the issue of motive rendered inadmissible because it might also tend to constitute proof of another crime or discredit defendant's character. See State v. Holt, 592 S.W.2d 759, 775 (Mo. banc 1980); State v. Richardson, 515 S.W.2d 571, 573 (Mo. 1974).

C.

Prior to trial the court sustained defendant's motion to suppress a mattress cover seized during a warrantless search of defendant's residence. During cross-examination of defendant, the state asked:

> You were aware that in the upstairs bedroom of that house that there was a mattress that was covered with human feces --

Defendant objected and requested a mistrial on the ground his motion to suppress the feces covered mattress had been sustained by the trial court. The court overruled the objection and motion for mistrial noting that there was evidence independent of any search and seizure that would authorize the question. Appellant now charges error to the trial court for overruling the objection and motion. He argues that this statement was "clearly calculated to inflame the passion of the jury against the defendant by mentioning matters of an inherently abhorrent nature."

Evidence obtained by an illegal search and seizure is not admissible against the defendant in a criminal case. If, however, the state gains the same knowledge or evidence from an independent source it may become admissible. State v. Wilkerson, 349 Mo. 205, 159 S.W.2d 794, 798 (1942).

There is evidence independent of the suppressed mattress cover to support the cross-examination of the defendant on this matter. John Campbell had previously testified that at the time of the murder he could

smell the human waste. It was all over the sheets, and the sheets and her kind of came off of the bed the same time he pulled her . . . .

* * * *

Q. Could you see anything on the bed?
A. You could see the human waste, yes.

The state's question was not designed to inflame the jury. Defendant had taken the stand and denied strangling Karen Keeton. On cross-examination the state attempted and was successful in getting defendant to admit that he had given an excuse to someone for the feces on the bed, thereby acknowledging its presence and corroborating John Campbell's testimony. The court properly permitted the state's question.

IV.

Section 565.014.1, requires this Court to review a sentence of death when imposed. Section 565.014.3 provides:

> With regard to the sentence, the supreme court shall determine:
>
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The record in this case demonstrates that George Mercer's death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor.

The jury found as statutory aggravating circumstances that the "defendant, as an agent or employee of Stephen Gardner and at his direction, murdered Karen Keeton", § 565.012.2 (6), and that the murder of Karen Keeton involved deprivity of mind and that as a result thereof it was outrageously or wantonly vile and inhuman, § 565.012.2 (7).[4]

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[4] This subsection provides:
(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

The evidence supports the jury's findings.[5]

Defendant forced Karen Keeton, a total stranger, into a bedroom aided by a sawed-off shotgun. There is evidence to show that he had sex with Karen, and that he stated his intention to return for more. He compelled her at gunpoint to perform oral sex on David Gee while others watched. She expressed fear for her well-being to David Gee and John Campbell. When Steve Gardner told defendant to "kill the bitch", he agreed to do so. He grabbed her about the throat, choking

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[4] - cont'd.

In Gregg v. Georgia, 428 U.S. 153 (1976), the petitioner attacked the Georgia aggravating circumstance which authorized imposition of the death penalty if the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" contending that it was so broad that capital punishment could be imposed in any such case. The Court denied the challenge stating:

> It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.

Id. at 201.

Thereafter the Georgia Supreme Court recognized that "there is a possibility of abuse of [this] statutory aggravating circumstance" and emphasized that it would not permit the aggravating circumstance to become a "catch all" for cases not fitting within any other aggravating circumstance; the court stated it would restrict its "approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core." Harris v. State, 237 Ga. 718, 732-33, 230 S.E.2d 1, 10-11 (1976) cert. denied, 431 U.S. 933 (1977). Likewise, it is the intention of this Court to restrict application of § 565.012.2(7) to "cases that lie at the core" and to not permit it to become a "catch all" subsection.

[5] Although the evidence supports the jury's findings on both aggravating circumstances, this Court notes that in Georgia, whose death penalty scheme serves as the pattern for Missouri,

> Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance * * * does not taint the proceedings so as to invalidate the other aggravating circumstance found and the sentence of death based thereon.

Burger v. State, 245 Ga. 458, 265 S.E.2d 796, 800 (1980), cert. denied, 446 U.S. 988 (1980). See also Hamilton v. State, 246 Ga. 264, 271 S.E.2d 173 (1980), cert. denied, ___ U.S. ___, 101 S.Ct. 900 (1981); Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980); Collins v. State, 246 Ga. 261, 271 S.E.2d 352 (1980), cert. denied, ___ U.S. ___, 101 S.Ct. 900 (1981); Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938 (1980). But see Elledge v. State, 346 So.2d 998 (Fla. 1977); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Bufford v. State, 382 So.2d 1162 (Ala. App. 1980), cert. denied, 382 So.2d 1175 (Ala. 1980); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941 (1980); Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980).

her; he struck her with his fists; finally, after having a friend check her pulse, he succeeded in strangling her. After this he loaded the body in a truck, drove to the country, and dumped the body beneath a bridge.

In Godfrey v. Georgia, 446 U.S. 420 (1980), the Court held that the Georgia Supreme Court had failed to apply a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind . . . . , " because the defendants crimes could not

> be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes.

Id. at 1767. This case is unlike Godfrey v. Georgia, supra. "Depravity of mind" is demonstrated in this case by the mode of killing preceeded by extended sexual and psychological abuse of the victim. See Hance v. State, 245 Ga. 856, 268 S.E.2d 339, 345-46 (1980), cert. denied, 49 U.S.L.W. 3443 (December 16, 1980).

The enumerated legal errors have been denied for the reasons stated, and the statement of evidence prepared from the record factually substantiates the verdict. Section 565.014.7. The evidence also supports the finding of the aggravating circumstances and the sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

This is the first capital murder case decided on appeal in which the death penalty was imposed under the law effective May 26, 1977. The records of all capital cases in which sentence was imposed after the effective date, accumulated pursuant to § 565.014.6, have been reviewed. Those cases in which both death and life imprisonment were submitted to the jury, and which have been affirmed on appeal are considered as similar cases, § 565.014.5: State v. Mitchell, ___ S.W.2d ___ (Mo. banc 1981); State v. Williams, 611 S.W.2d 26 (Mo. banc 1981);

State v. Royal, 610 S.W.2d 946 (Mo. banc 1981); State v. Borden, 605 S.W.2d 88 (Mo. banc 1980); and State v. Downs, 593 S.W.2d 535 (Mo. 1980). These cases support affirmance of the death penalty in this case; defendant's sentence to death for the murder of Karen Keeton is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

The judgment is affirmed.

ANDREW JACKSON HIGGINS, Judge

DONNELLY, RENDLEN, WELLIVER and MORGAN, JJ., concur; BARDGETT, C.J., concurs in part and dissents in part in separate opinion filed; SEILER, J., dissents in separate dissenting opinion filed.
Date of execution set for June 26, 1981.

APPENDIX

Harry Bumgarner:

"EXAMINATION BY MR. HAMILTON (Prosecutor):

Q. Mr. Bumgarner, this is a charge of capital murder, which means that it does carry the possibility of capital punishment, or the death sentence. My inquiry is directed to find out what your attitude is toward capital punishment. If, during the trial of this case the facts and circumstances were developed that in fact the jury could consider capital punishment, would you, as a juror, consider capital punishment as a possible alternative?

A. I don't think so.

Q. Are you morally and religiously opposed to capital punishment?

A. Yes.

Q. And you feel you couldn't bring back a sentence of -- the death sentence under any circumstances?

A. I don't think so.

Q. So regardless of how severe and aggravated the circumstances are, you don't feel that you could bring back a death penalty?

A. I don't believe I could. "

Rosalie M. Delange:

"EXAMINATION BY MR. HAMILTON (Prosecutor):

Q. Mrs. Delange, this is a charge of capital murder, which carries with it the possibility of capital punishment, which is the death penalty.

* * * *

Q. Basically I am interested in your attitude as to the death penalty, and my question is: If the facts and circumstances which come out during the course of this trial are such that the jury, under the law, can consider as a possible alternative, capital punishment --

* * * *

Q. -- would you, as a member of that jury, give consideration to that as a possibility?

A. I am opposed to capital punishment.

Q. Okay, then are you basically morally and religiously against capital punishment as a punishment?

A. I would say that.

Q. Are you such that basically, regardless of what the circumstances are, you are against capital punishment?

A. I have always thought of myself as being against capital punishment. I don't really know, when you put it that way, maybe circumstances could alter my decision, but I really think I would have to say I'm against it.

Q. Am I correct in saying that basically you wouldn't vote for capital punishment regardless?

A. I think, right, I would have to say that.

Q. No matter how violent the crime might be, you would be against that as punishment, am I correct?

A. I just don't believe in taking a life. I just don't. I'm sorry.

* * * *

Q. (By Mr. Lozano - Defense Counsel): -- if -- can you say that you would never consider capital punishment under any circumstances whatsoever?

A. I will say that."

Elston Dalton:

"EXAMINATION BY MR. HAMILTON (Prosecutor):

Q. Mr. Dalton, this is a charge of capital murder, which carries a possibility of capital punishment --

* * * *

Q. -- the death penalty. And my question is about your attitude as to the death penalty. If the facts and circumstances in this trial are such that under the law the jury can consider as an alternative the death penalty, would you, as a member of that jury, be willing to consider that as a possible alternative?

A. Well, I never did much like that subject.

Q. Let me ask you the, ; r, are you telling us that basically you would be unwilling to return a death penalty verdict?

A. I believe I would sir.

Q. Would you be willing to, or be unwilling to, return such a verdict regardless of what the evidence is?

A. I didn't understand you.

Q. Are you saying, sir, that you wouldn't return a result of death, a death penalty result, regardless of what the evidence is?

A. Well, as I said, I don't believe in the death penalty.

Q. Basically the opposition is such that you wouldn't return it under any circumstances, is that correct?

A. Yeah, that's the way I feel about it. "

Juanita Bishop:

"EXAMINATION BY MR. HAMILTON (Prosecutor):

Q. Mrs. Bishop, this is a charge of capital murder, and it carries with it the potential of the death penalty, the death sentence. Basically I am interested in your attitude as to capital punishment.

If the facts and circumstances brought out during the trial are such that they justify it, justify the dealth penalty, would you consider giving the death penalty?

A. (Pause) I don't think so.

Q. Do you feel that your inclination is that morally and religiously you don't feel you could bring back a sentence of death in any case?

A. Yes, I don't feel like I'd be a judge of it.

Q. You don't feel you could ever bring back the death penalty regardless of the situation, is that correct?

A. Yes.

* * * *

Q. (By Mr. Lozano - Defense Counsel) Yes. Is your position that you could never vote for capital punishment in any case at any time no matter what the facts?

A. I'd say it is. "

Priscilla Choate:

"EXAMINATION BY MR. HAMILTON (Prosecutor):

Q. Mrs. Choate, this is a charge of capital murder, and it carries with it the possibility of the death sentence, or of capital punishment.

* * * *

Q. Basically I am interested in inquiring of you as to what your attitude is toward capital punishment, and my question is: If, during the trial of the case the facts and circumstances that come forth as evidence are such that under the law the jury could consider the death penalty, would you, as a juror, consider the death penalty?

A. I don't believe in capital punishment.

Q. Are you opposed to capital punishment?

A. Yes, I am.

Q. Are you religiously and morally opposed to it?

A. Well, I don't know, its just my opinion. It's not really from religion or anything like that.

Q. But it's such that you feel that you would not bring back the death penalty under any circumstances?

A. I don't think I would.

Q. So, regardless of how severe or aggravated the situation is, it's your feelings that you could not impose the death sentence?

A. I don't think so.

* * * *

THE COURT: Ma'am, you say you don't think so. We need to be a little more precise.

MRS. CHOATE: Well, I couldn't, no. That's just my own personal feelings; I just couldn't do it.

* * * *

Q. (Examination by Mr. Fiorella - Defense Counsel) . . . . Would you rule that out [death penalty] because of your feelings?

A. You mean corporal punishment?

Q. Yes.

A. Yeah, I believe I would. I just can't go along with it.

Supreme Court of Missouri

en banc

DUPLICATE
OF FILING ON
MAY 11 1981
IN OFFICE OF
CLERK SUPREME COURT

STATE OF MISSOURI,
Plaintiff-Respondent,
vs.
GEORGE MERCER,
Defendant-Appellant.

No. 61797

OPINION CONCURRING IN PART AND DISSENTING IN PART

I concur in the affirmance of the judgment of conviction of capital murder. I dissent from the affirmance of the death penalty on the record here and would, for the reasons stated infra, vacate this death penalty but allow the state to again proceed to obtain the death penalty from a jury upon the state's notifying this Court within 30 days of its decision to do so. If the state failed to so notify this Court of its intent to seek the death penalty anew, the sentence of life imprisonment without parole for 50 years should be imposed.

The proceedings in a capital murder case are bifurcated and error which affects only the punishment aspect of this crime warrants a new trial only as to punishment, as provided in § 565.006.3 RSMo 1977.

The evidentiary facts have been amply stated and clearly support a verdict of guilty of capital murder. But, when the punishment is death, then I believe strict compliance with constitutional requirements and those statutes authorizing the death penalty is mandatory. Death penalty cases are different from other cases for that simple reason - death. It is not correctable, as are other sentences, and therefore strict adherence to procedure is necessary. The fact that the defendant showed no mercy to the

deceased and appears to have committed just about as evil an act as one could do does not justify law-abiding citizens - jurors, judges and lawyers - from straying from strictly correct proceedings as we go about the task of deciding whether to legally kill him.

I agree with part I of Judge Seiler's dissent reference the response to juror Bumgarner to questions relating to his ability to consider the death penalty. For the reasons stated there the juror's answers did not justify his removal for cause under Witherspoon v. Illinois, 391 U.S. 510 (1968). That error goes to the death penalty only and therefore, under the bifurcated system, did not prejudice the guilt part of the trial but did prejudice the punishment aspect of the case for the reasons stated in Witherspoon, supra.

Part IV of the principal opinion and part III of the dissent of Seiler, J., addresses the issue of the statutory aggravating circumstances. It appears to me that the principal opinion holds that there was sufficient evidence to find that the "defendant, as an agent or employee of Stephen Gardner and at his direction, murdered Karen Keeton," § 565.012.2(6). However, it also appears that perhaps the principal opinion inferentially adopts the rule in Georgia as set forth in footnote 5, which may mean that the death penalty is to be upheld regardless of whether the "aggravating circumstance" noted, supra, was supported by the evidence and perhaps regardless of whether that circumstance can, under the evidence here, be rationally regarded as "aggravating."

In my opinion, the evidence fails to support a finding that defendant was "an agent or employee of Stephen Gardner." There is no evidence he was an employee of Gardner. There is no evidence, in my opinion, that the defendant killed the deceased because Gardner told him to. In fact, the state's position is that he killed her to keep her from prosecuting him for rape as the other girl had done.

I have tried to perceive just how a murder such as this is worsened or the defendant a more heinous person if he killed the

deceased as an agent or employee of another. I have no difficulty in understanding aggravating circumstance # 4 which provides for a killing for profit for himself or another and the first part of # 6 which provides that the "offender caused or directed another to commit capital murder." Number 4 recalls to mind Murder Incorporated of yesteryear and the first part of # 6 recognizes that if a person causes or directs another to commit capital murder, the director is surely at least as guilty as the actor. But I cannot see what the rationale is when the actor is the employee or agent. How does it make the act more heinous or the defendant more evil if the defendant is being directed by another as the employee or agent of another? I am not saying the circumstance submitted here, as to the actor, could never be an "aggravating circumstance" but under the facts of this case I do not see any rational basis here for saying the verbal exchange between defendant and Gardner made defendant's acts more aggravated or heinous. In my opinion, the evidence was insufficient to support the giving of aggravating circumstance # 6.

Furthermore, I would not adopt the Georgia rule noted in footnote 5 of the principal opinion. In my opinion, there must be evidence to support the submission of each statutory aggravating circumstance found by the jury and upon which the death penalty was based, in whole or in part, and the statutory circumstances must be ones that can rationally be perceived as aggravating in the particular case. Circumstance # 6 should not, in my opinion, have been submitted here because it fails on both counts in this case.

I agree with the rule requiring evidence to support each aggravating circumstance submitted as set forth in the dissent of Seiler, J., and if the evidence is insufficient to support an aggravating circumstance upon which the jury based the death penalty, in whole or in part, the death penalty cannot stand.

I would therefore (1) affirm the judgment of capital murder, (2) vacate the death penalty and order that the sentence will be entered as life imprisonment without parole for 50 years (565.008) unless the state, within 30 days of this decision, notifies the Clerk of this Court that it intends to proceed with a new trial on punishment pursuant to § 565.006.3, whereupon the cause would be

remanded to circuit court for a new trial on punishment only.

John E. Bardgett, Chief Justice

Supreme Court of Missouri

en banc

DUPLICATE
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IN OFFICE OF
CLERK SUPREME COURT

STATE OF MISSOURI,
Plaintiff-Respondent,
v.
GEORGE MERCER,
Defendant-Appellant.

No. 61797

DISSENTING OPINION

I respectfully dissent and for reasons stated below, I would reverse and remand this cause.

I

I cannot agree with the principal opinion's treatment of appellant's objection to the striking for cause of venireman Bumgarner under Witherspoon v. Illinois, 391 U.S. 510 (1968). The principal opinion found that Bumgarner had made it "unmistakably clear" that he would not impose the death penalty under any circumstance. In Witherspoon, supra at 516 n. 9, the Court required that

> "Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position."

This requirement has been reiterated by the Court in Boulden v. Holman, 394 U.S. 479, 482 (1969) and in Maxwell v. Bishop 398 U.S. 262, 265 (1970).

In Davis v. Georgia, 429 U.S. 122, 123 (1976), the Court held that

> "if [one] venireman is improperly excluded [under the Witherspoon standard] any subsequently imposed death penalty cannot stand."

The Davis court cited Wigglesworth v. Ohio, 403 U.S. 947 (1971) rev'g State v. Wigglesworth, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969). In

hat case the United States Supreme Court apparently disapproved of the Ohio Supreme Court's conclusion that,

> "Even if defendant could claim that the excusing of this one juror for cause was error, we have difficulty in seeing how any prejudice therefrom can be established, especially since the prosecution still had five or six peremptory challenges available to excuse that juror when selection of the jury was completed."

248 N.E.2d at 614. If Bumgarner was improperly dismissed, as I contend he was, then the death penalty must be reversed.

The question and answers between the prosecuting attorney and veniremen Bumgarner are set forth below. This exchange does not provide a constitutional basis for the exclusion for cause of Bumgarner from jury service.

> "Q. Mr. Bumgarner, this is a charge of capital murder, which means that it does carry the possibility of capital punishment, or the death sentence. My inquiry is directed to find out what your attitude is toward capital punishment. If, during the trial of this case the facts and circumstances were developed that in fact the jury could consider capital punishment, would you, as a juror, consider capital punishment as a possible alternative?
>
> A. I don't think so.
>
> Q. Are you morally and religiously opposed to capital punishment? A. Yes.
>
> Q. And you feel you couldn't bring back a sentence of -- the death sentence under any circumstances?
>
> A. I don't think so.
>
> Q. So regardless of how severe and aggravated the circumstances are, you don't feel that you could bring back a death penalty?
>
> A. I don't believe I could.
>
> MR. HAMILTON: Thank you, sir. I have no other questions."

The principal opinion relies on State v. Pride, 567 S.W.2d 426, 433 (Mo. App. 1978) for the proposition that the response "I don't think so" is not equivocal in its context; rather, that it is "common vernacular to express the negative". I would first point out that Pride was not a capital murder case in which the death penalty could be imposed. Pride was an assault case, where defendant was a black man. The wife of one

of the veniremen had had "an unpleasant encounter with blacks in the past." When asked if that would affect him in sitting in the case, the venireman replied, "I don't really think so, but I thought I would mention it." This disclaimer is more emphatic than that in the case before us. Second, while I would agree that when someone says "I don't think so" he may intend to express the negative, he may also mean that he is not sure. At best, it is equivocal, ambiguous, and uncertain. Bumgarner did not say that he would not be able to decide the issues on the basis of the law and evidence even though opposed genetically to capital punishment. We are talking about taking defendant's life by judicial order. In such circumstances, it is not the proper duty or function of the trial court or this court to "interpret" such a phrase by resolving the doubt in favor of the state when a man's life is at stake and the United States Supreme Court has declared that

> "Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment . . . it simply cannot be assumed that that is his position." (emphasis supplied)

391 U.S. at 516 n. 9.

Bumgarner's view on the subject was left hanging in the air, unresolved. The Witherspoon test was not satisfied as to Bumgarner. If the prosecutor does not get an unequivocal response, then he is not entitled to have the venireman dismissed for cause. Cf. Adams v. Texas, 448 U.S. 38, ___, 100 S.Ct. 2521, 2528-29 (1980) in which the Supreme Court said:

> "[N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever [that being presented with the option to give death penalty would have on the propective juror] is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (emphasis supplied).

II

On the issue of sustaining fifteen challenges for cause on the ground that the venire persons were irrevocably committed against imposing the death penalty regardless of the circumstances, the principal opinion holds it will not reverse the conviction on the basis of studies indicating that "death qualified" jurors are not impartial on the issue

f guilt. In addition to the studies cited by defendant and the tudies cited in Hovey v. Superior Court of Alameda County, 28 Cal.3d , 616 P.2d 1301, 168 Cal. Rptr. 128 (banc 1980) and Grigsby v. Mabry, 83 F. Supp. 1372 (E. D. Ark.), aff'd, 637 F.2d 525 (8th Cir. 1980), here should be added White, Death-Qualified Juries: The Prosecution- roneness Argument Reexamined, 41 U. Pitt. L. Rev. 353 (1980) and Oberer, oes Disqualification of Jurors for Scruples Against Capital Punishment onstitute Denial of Fair Trial on Issue of Guilt?, 39 Tex. L. Rev. 545 1961). The latter author states the defendant's predicament well: Were I to be charged with a capital offense, I should greatly prefer o have the issue of my guilt or innocence tried by the first twelve eople to pass the courthouse, no questions asked by prosecution or efense, than by a jury qualified upon the death sentence." Oberer, upra at 545. (original emphasis). White, supra at 406, states: "If, s the Supreme Court has indicated, the conclusion that death is a pun- shment different in kind from all other punishments has committed our ociety to the ideal of providing fair and rational procedures which will ully safeguard the rights of capital defendants, then examination of the elevant data should lead to the conclusion that the death qualified jury, s it presently exists, should be eliminated from our system of justice."

Under the Missouri Constitution, art. I, § 18(a), defendant is en- itled to trial by an impartial jury. This is an absolute right. There re no qualification or exceptions to it. The state is not entitled to he death penalty against this defendant as a matter of right. All it s entitled to is a jury which will consider the death penalty, assuming uilt has been determined. I do not believe challenges for cause at the utset of the trial are valid unless the prospective juror declares that is views on capital punishment are such as would prevent him from making n impartial decision as to defendant's guilt. It does not follow that ersons opposed to the death penalty are necessarily thereby unable to ake an impartial decision as to defendant's guilt. But that was never letermined here - the prospective jurors were excluded simply because

hey would not vote for the death penalty. So defendant wound up with ury which had no scruples against the death penalty, which is a far ry from having a jury with some members who oppose the death penalty ut could nevertheless make an impartial decision as to guilt. This rror in excluding prospective jurors who were not shown to be incapable f making an impartial decision as to guilt or innocence requires that e cause be reversed and remanded.

The studies mentioned earlier about death qualified juries being ore that neutral with respect to guilt confirm what lawyers with broad ... experience already believe: it is easier to obtain a conviction ... ore jury with a jury which has no objections to the death penalty,[1] ... it is easier to obtain a verdict in some amount for the plain- ...ff in a damage suit with a jury made up only of those who have no ob- ...ions to awarding large amounts of damages.

... present procedure permits prosecutors, merely by filing a ... order charge, to obtain a death qualified, conviction prone ... even though they promptly waive the death penalty upon conviction ... guilt.[2] This powerful incentive to overcharge would be eliminated ... we restrict voir dire examination along the lines here suggested. ... also would provide a more impartial jury.

III

I further disagree with the principal opinion's holding that the ...ence supported the jury's finding of both aggravating circumstances. I do not believe that there was sufficient evidence to support the jury's ... of the first aggravating circumstance - that defendant killed ... victim as the "agent or employee" of Gardner.

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1. One 1966 study concluded that the odds were twenty-four to one ... jurors without scruples against the death penalty were more likely ... the scrupled jurors to vote guilty. H. Zeisel, Some Data on Juror ...itudes Towards Capital Punishment 28-29 (1968).

2. ... example, in State v. Strickland, 609 S.W.2d 392 (Mo. banc 1980) ... State v. Hall, No. 61796, (Mo. March 9, 1981), both from Jackson ...unty, the prosecutor in each case after filing a capital murder charge ... obtaining a death qualified jury, waived the death penalty immediately ...er obtaining a guilty verdict on the guilt or innocence stage of the trial.

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Section 565.012.3(6), RSMo 1978[3] lists as an aggravating circumstance that "The offender . . . committed capital murder as an agent or employee of another person." Since there is no evidence that defendant was an employee of Gardner, we must assume that the jury found defendant was an agent of Gardner. Black's Law Dictionary 59 (5th ed. 1979) defines an agent as "A person authorized by another to act for him, one intrusted with another's business." See State ex rel. Pagliara v. Stussie, 549 S.W.2d 900, 903 (Mo. App. 1977). Black's, supra, also defines an agent as "One who acts for or in place of another by authority from him; a substitute, a deputy, appointed by principal with power to do the things which principal may do." Cf. Mahler v. Tieman, 550 S.W.2d 623, 628 (Mo. App. 1977): "A valid agency may be found where the conduct of the parties manifests the consent of one person to another that the other shall act on his behalf and be subject to his control and consent by the other so to act." See also Restatement (Second) of Agency § 1 (1958).

The part of § 565.012.3(6) directed against one who commits capital murder as the agent or employee of another is meant for someone who fits the accepted concept of agent or employee. There is no evidence that such was the situation here. The only evidence upon which the jury could have based its finding that defendant was an agent of Gardner was that defendant asked Gardner what to do with Karen Keeton and Gardner replied, "Kill the bitch." There is no evidence to demonstrate that Gardner had authority or control over defendant. The fact that Gardner said to defendant, "Kill the bitch", followed by defendant's strangling of the victim, does not establish a cause and effect relationship. It does no more than show that the two were in accord. Without further evidence of an agency relationship between Gardner and defendant, the first aggravating circumstance cannot be upheld.

The statute, § 565.012.1(1), and the appropriate MAI-CR2d instruction, 15.48, require that only those aggravating circumstances supported by the

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3. Unless otherwise indicated, all statutory citations are to RSMo 1978.

evidence by submitted for the jury to consider. It would be most unfair and prejudicial to permit the state to submit and argue to the jury aggravating circumstances not supported by the evidence.[4] The legislature and this court properly required that aggravating circumstances which the jury is to consider in determining whether the death penalty is warranted be supported by evidence.

If the finding of the first aggravating circumstance is unsupported under the evidence, as I contend it is, then the sentence of death cannot stand. When one or more aggravating circumstances have been improperly submitted to, or found by, the jury (or the trial court), then, even if other aggravating circumstances were legitimately found, the case must be remanded for sentencing, § 565.014.5(2). The reason for this is simple: "[R]egardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); See also Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). There is no way to determine what the jury would have decided as to penalty had they not improperly been allowed to consider as an aggravating circumstance that defendant was acting as Gardner's agent. The jury may have felt free to tar defendant with Gardner's reprehensible conduct in addition to his own. For other cases in which the courts have decided that failure of one or more aggravating circumstances was cause for reversal of the death sentence, see Bufford v. State, 382 So.2d 1162 (Ala. Ct. Crim. App. 1980), cert. den., 382 So.2d 1175 (Ala. 1980); State v. Cherry, 257 S.E.2d 551 (N.C. 1979), cert. den., 446 U.S. 941 (1980). See also

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4. The prosecutor, in arguing to the jury for the death penalty, said that Gardner told defendant to kill the victim, that defendant readily went along with this, and that the jury should "[r]emember that as an important piece of evidence." So the jury was urged to consider the "agent or employee" aggravating circumstance as a justification for the death penalty. How can it be said they did not do so?

Stephans v. Zant, 631 F.2d 397, 406 (5th Cir. 1980) in which the court observed:

> "It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that other aggravating circumstances were established, they would not have recommended the death penalty but for the [considering of the invalid aggravating circumstance]."

The court held that the submission of an impermissible aggravating circumstance to the jury did not permit the jury's discretion to be sufficiently channeled, citing Godfrey v. Georgia, 428 U.S. 420 (1980), and that the process by which the death penalty was imposed was therefore not "rationally reviewable", citing Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

The principal opinion cites several Georgia cases which uphold the death penalty even after one, or more, aggravating circumstance was found to be improperly considered. Georgia stands alone in arriving at this result. The first four Georgia cases cited in footnote 5 of the principal opinion rely on the fifth case, Gates v. State, 244 Ga. 587, 261 S.E. 2d 349 (1979), cert. den. 445 U.S. 938 (1980). Gates, however, did not address how an aggravating circumstance which had been improperly submitted to, or considered by, a jury may affect the decision-making process of the jury; it merely makes the unsupported conclusion that,

> "Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon."[5]

261 S.E.2d at 358 (emphasis supplied). I question that a court can state with certainty that a jury invariably based its imposition of a death

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5. In arriving at this conclusion, the Gates court cited Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), aff'd sub nom 428 U.S. 153 (1976). Gregg, however, is inapposite. In that case, there were two different counts of capital murder. The death penalty had been given on both counts. When the Georgia Supreme Court reversed the death penalty on one count because of improperly submitted aggravating circumstances, it affirmed the death penalty on the other count which was based on properly found aggravating circumstances. Such is a completely different situation from Gates or the instance case.

penalty on any one of multiple aggravating circumstances when the jury found multiple aggravating circumstances.

Furthermore, the principal opinion implies that our death penalty statute is patterned after Georgia's and therefore it follows that we should hold the same as Georgia. I cannot agree. This is Missouri, not Georgia. Georgia's traditions and proclivities are not ours. According to the most recent Death Penalty Reporter (Vol. 1, No. 8) at p. 26, ninety-two people are on death row in Georgia compared to eight in Missouri. With all due respect to our sister state, we should not necessarily walk Georgia's path just because our statutes are similar.

In any case, the similarity between our statute and Georgia's is irrelevant here. Every state with a death penalty statute, including the three which hold contrary to Georgia, permit consideration of multiple aggravating circumstances. See, e.g., Ala. Code tit. 13, §§ 11-4 and 11-6 (1975); Fla. Stat. Ann. § 921.141 (Supp. 1981); N.C. Gen. Stat. § 15A-2000 (Supp. 1979). There is nothing peculiar about the Georgia in this regard. The only peculiarity is that we are proposing to hold as Georgia alone does. In my opinion, the reasoning found in the cited cases from Alabama, Florida, North Carolina, the Fifth Circuit and in the other cases discussed below goes unanswered by both the Georgia cases and the principal opinion.

Where one of the aggravating circumstances found by a death sentencing jury is improper, the situation is analogous to one where a general verdict of guilty has been returned by a jury instructed on alternative theories of conviction, one but not all of which permitted guilt to be rested upon an unconstitutional ground. Under Stromberg v. California, 283 U.S. 359 (1931) and many cases following it, such a conviction will not stand.

An analogy can be made to Missouri policy in civil cases that a "jury should not be instructed on any theory of recovery or defense which is not supported by the evidence . . . ." Hounihan v. State Farm Mutual Automobile Insurance Co., 441 S.W.2d 58, 63 (Mo. App. 1969); See also Committee's Comment to MAI 1.02, p. 7 (2nd ed. 1969):

> "The Committee believes that the jury should not be instructed on a theory or defense not supported by the evidence and that any such submission should be reversible error. A theory of recovery or defense should not be submitted unless it can stand alone. The present practice has been a crutch which has done little but confuse by presenting imaginary issues for the jury's determination."

Further, "[i]nstructions on issues not supported by any evidence tend to authorize the jury to rove in reaching their verdict." State v. Higdon, 356 Mo. 1058, 204 S.W.2d 754, 755 (banc 1947).

In Chilton v. Wright, 480 S.W.2d 1, 6 (Mo. 1972), written by the author of the principal opinion herein, the liquor license of Modene Gatewood and Edd C. Chilton was revoked by the supervisor of liquor control on two grounds: (1) unlawful selling for resale and (2) unlawful possession of refilled containers. Our review showed a lack of substantial evidence to support the first ground, although there was substantial evidence to support the second ground. The license revocation was reversed and the cause remanded for reconsideration by the liquor supervisor, for the reason that the license was revoked "on the strength of two violations, one of which has been found unsupported". The supervisor was directed to reconsider the matter for assessment of penalty, if any, on the basis of the single charge supported by the evidence.

In the Chilton case it was evident that the supervisor had revoked the license on two grounds, but one was bad. It could not be determined what he would have done had he limited his consideration to the only violation shown. Likewise in the case before us, the jury, as required by MAI-CR2d 15.48 and by the statute, § 565.012.4, set forth in its verdict the aggravating circumstances found beyond a reasonable doubt. The jury set forth two such circumatances. One of these circumstances, however, the "agent and employee" circumstance, is unsupported by the evidence. Here, as in the Chilton case, the death penalty (there it was the liquor license revocation) was imposed "on the strength of two violations (aggravating circumstances), one of which has been found unsupported." If we reverse and remand for reconsideration where only a liquor license is involved, surely we can do no less where a life is at stake.

Submitting to the jury aggravating circumstances not supported by the evidence can only create confusion in the minds of the jurors and may impermissibly tip the balance in favor of the death penalty. We cannot say that the jury would have given defendant the death penalty in this case had the agent or employee aggravating circumstance not been submitted. When the death penalty is before us, we should not affirm on the basis of conjecture.

IV

While I agree with the avowal of the principal opinion that we should not and will not permit § 565.012.2(7) to become a "catch all" subsection on aggravating circumstances, I do not agree that we discharge our duty under § 565.014.2(3) to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases" by restricting our consideration to cases in which both death and life imprisonment were submitted to the jury and which have been affirmed on appeal. This is too limited in scope. It eliminates from consideration all cases in which the state waived the death penalty, all cases in which life imprisonment was given and no appeal taken, all capital cases pending before us in which life imprisonment was given, and all cases in which capital murder was charged but the jury found defendant guilty of a lesser crime than capital murder. All these examples are cases in which the jury convicted defendant of murder but chose not to impose the death penalty. The purpose of appellate review of the death penalty is to serve "as a check against random or arbitrary imposition of the death penalty." Gregg v. Georgia, 428 U.S. 153 (1976). It is our solemn duty, in my opinion, to guarantee that similar aggravating and mitigating circumstances do not bring about a death sentence in one case and life imprisonment in another. The statute and the Supreme Court cases require that the death penalty be imposed with an even hand. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). We are required to make a proportionality review. Gregg v. Georgia, supra.

By "similar cases" is meant similar capital murders, not limited

only to those where both death and life imprisonment were submitted to the jury and then affirmed on appeal, whichever way the case went on punishment. The evil deed is the murder and what accompanied it and that, as well as the defendant, is what must be looked at in comparing what one defendant received in punishment under a capital murder charge with what another received. The fact that a capital murder defendant does not get the death penalty or gets a new trial or that the state waived the death penalty in his case or that his case is still pending before us does not mean that we can ignore his case in making our comparison. Once we accept the idea, as we must, that the death penalty cannot be inflicted at random, or arbitrarily or inconsistently, then necessarily we must take into consideration all capital murders we know about. We are furnished with a special assistant for this purpose. Section 565.014.6. He is to accumulate the record of all capital cases in which sentence was imposed after May 26, 1977. The statute says "sentence was imposed". It is not limited to capital murders where the death sentence was imposed. As said in Baldus, et al., Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1, 20-21 (1980),

> "The efficacy of the review procedure also depends on the number of 'similar' cases used in the comparison and the completness of the information available concerning those other cases. In other words, the apparent efficacy of the protection against comparative excessiveness which proportionality review can theoretically provide may be misleading. Whether defendants sentenced to death really receive that protection depends almost entirely upon the thoroughness and accuracy of the actual review process."

Realizing as I do that to do so is no easy task, nevertheless, the principal opinion articulates no standard by which the review was made in this case or how the cases mentioned in the opinion in which a life sentence was given support the affirmance of the death penalty.

We see one capital murder case after another in which the killing was horrible or atrocious or whatever other color word comes to mind and in which the defendant received life imprisonment, not death. See, for example, State v. Strickland, 609 S.W.2d 392 (Mo. banc 1980) (one victim shot in the head; in an adjoining room three other people were tied up

and two of them were shot in the head; the third escaped when the gun pointed to her head did not fire, although she was later hit with a shotgun blast; state waived death penalty); State v. Holmes, 609 S.W.2d 132 (Mo. banc 1980) (sixteen year old victim stabbed sixty-four times with an ice pick; state waived death penalty); State v. Baskerville, No. 61661, pending before this court on life imprisonment sentence (multiple murders including seven year-old boy and his mother; boy was last to be killed and begged for his life).

In State v. Mitchell, 611 S.W.2d 223 (Mo. banc 1981), the 24 year-old defendant was convicted, life sentence, along with another (see State v. Turner, No. 61974, pending, life sentence) of the capital murder of the owner of a tobacco store and his employee, aged 72 and 61 respectively. The murders were committed in the course of a robbery. Both victims received blows to the head with a blunt instrument, such as a beer bottle, both had fractured ribs, and both received multiple stab wounds, apparently from a broken beer bottle. One victim was stabbed fifteen times; the other was stabbed five times in the chest and several times in the abdomen and other parts of the body.

In State v. Downs, 593 S.W.2d 535 (Mo. 1980), the defendant was convicted of the capital murder of a married couple and their eighteen year-old daughter, with a life sentence. The defendant and others robbed the store owned by the couple and shot them each in the head. When the daughter returned from her classes and approached an opened door she was grabbed by defendant and another and pulled into the store where her parents lay dead. The girl fell to her knees and begged for her life. The defendant put a gun to her head and shot her.

It seems to me that what Mr. Justice White concluded in Furman v. Georgia, 408 U.S. 238, 313 (1972) (concurring) remains the fact. He said there that

> "[t]he death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in

which it is imposed from the many cases in which it is not."

As said at the outset, I would reverse and remand for a new trial.

Robert E. Seiler, Judge

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

June --, 1981

Mr. Cenelio Lozano, Jr.
P.O. Box --
Harrisonville, Missouri --

In re: State of Missouri vs. George Mercer
Supreme Court No. 61797

Dear Mr. Lozano:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Appellant's motion for rehearing, overruled."

Very truly yours,

Thomas F. Simon

Clerk.

cc: Attorney General

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APPENDIX E

(Voir dire examination. State of Missouri v. George Mercer)

THE COURT: Your are Juanita Bishop?

MRS. BISHOP: Yes.

THE COURT: Mrs. Bishop, Mr. Hamilton will have some questions to ask you, then one of these gentlemen will have some questions for you.

EXAMINATION BY MR. HAMILTON:

Q. Mrs. Bishop, this is a charge of capital murder, and it carries with it the potential of the death penalty, the death sentence. Basically, I am interested in your attitude as to capital punishment.

If the facts and circumstances brought out during the trial are such that they justify it, justify the death penalty, would you consider giving the death penalty?

A. (Pause) I don't think so.

Q. Do you feel that your inclination is that morally and religiously you don't feel you could bring back a sentence of death in any case?

A. Yes, I don't feel like I'd be a judge of it.

Q. You don't feel you could ever bring back the death penalty regardless of the situation, is that correct?

A. Yes.

MR. HAMILTON: I have no other questions, Your Honor.

MR. LOZANO: I have a few questions.

EXAMINATION BY MR. LOZANO:

A. Can you imagine a situation where perhaps someone known to you, like, say, would under certain circumstances be brutalized in some fashion, and as a result of that lose their lives, would something like that make a difference?

MR. HAMILTON: I will object in that it is personalizing the inquiry.

THE COURT: I'm inclined to think if it was someone known to her, she probably wouldn't be allowed to serve on the jury anyway, Mr. Lozano.

MR. LOZANO: Okay, Judge.

Q. (By Mr. Lozano) Then let me ask it this way: Are there any situations in your head, in your thinking and your imagination, where you feel maybe capital punishment would be warranted?

A. (Pause) Not to my knowledge. I really haven't thought about it that much.

Q. When you read things in the newspapers sometimes about again man's inhumanity to man, do you continue to be surprised about what one man will do to another?

A. I really don't read the paper enough to draw an opinion about that.

A. Okay. Is what you are saying is that under no circumstances--let me back up.

If you were convinced beyond a reasonable doubt that an individual had committed some horrible deed, maybe even beyond your imagination, and you were convinced of that situation, in that type of situation would you still completely rule out capital punishment?

A. I don't know how I could be convinced unless I would see it happen.

Q. Anything less than seeing it happen would--

A. Not that I can think of right now.

Q. I understand that nothing you can think of, but is your position that you could never bring, never vote for capital punishment in any case whatsoever at any time?

MR. HAMILTON: Excuse me, I will object. The question has been asked and reasked a half a dozen times.

MR. LOZANO: I don't think it's been asked that way, Judge.

THE COURT: You may answer the question, ma'm.

MRS. BISHOP: Do you want to restate your question?

Q. (By Mr. Lozano) Yes. Is your position that you could never vote for capital punishment in any case at any time no matter what the facts?

A. I'd say it is.

Q. Thank you. Have you lived in Greene County long?

A. All my life.

Q. Are you acquainted with the Cass County, Belton City area of Cass County, up north around Kansas City?

A. Just know the area, but I'm not acquainted there.

Q. Are you a housewife?

A. Yes, and I work, too.

Q. You are employed outside the home?

A. Um-hmm.

Q. What do you do?

A. I work in an office.

Q. What is your position?

A. I work in Sales Service Department, as a sales service clerk.

Q. If you had your druthers, would you druther not sit on this jury?

A. Well, yes, I would rather not.

MR. LOZANO: Thank you very much. I have no further questions.

THE COURT: Mrs. Bishop--Mr. Hamilton, do you have any other questions?

MR. HAMILTON: No.

THE COURT: Could we ask you to have a seat outside the door for a moment, ma'm?

(Veniremen leaves room.)

THE COURT: Any challenge for cause on Juanita Bishop?

MR. HAMILTON: The state challenges for cause.

THE COURT: State your challenge.

MR. HAMILTON: That she is unequivocally opposed to the death penalty under any facts or circumstances. Therefore, she wouldn't be able to follow the law, which in this case is that the death penalty could be given.

THE COURT: Do you have any comment?

MR. LOZANO: Yes, I do, Your Honor.

Judge, she's constitutionally entitled to be stricken if she's going to be by peremptory vote rather than by challenge for cause. There are a significant number of citizens in this county, in this state, in this city, who have a voice. She is part of the cross-section of this community. To permit a challenge for cause and to grant a challenge for cause under these circumstances would be to say that the state is more entitled than not to people who would vote the death penalty when not one word of evidence has been taken as yet.

It is the defense's position that she is entitled to sit on the jury by reason of being a representative portion of her community.

We would, therefore, say if the Court sustains a challenge for cause, Mr. Mercer will be denied a cross-section of the community and will be

denied his rights under the 6th and 14th Amendments of the United States Constitution and the similar portions under the Missouri Constitution.

THE COURT: The state's challenge for cause against the panel member, Juanita Bishop, is sustained. The lady will be and is excused for cause.

(venireman excused) (Tr. 112-118)

THE COURT: You are Harry Bumgarner?

MR. BUMGARNER: Yes, sir.

THE COURT: Mr. Bumgarner, Mr. Hamilton here will have some questions for you, then one of these gentlemen will have some questions for you.

EXAMINATION BY MR. HAMILTON:

Q. Mr. Bumgarner, this is a charge of capital murder, which means that it does carry the possibility of capital punishment, or the death sentence. My injuiry is directed to find out what your attitude is toward capital punishment. If, during the trial of this case the facts and circumstances were developed that in fact the jury could consider capital punishment, would you, as a juror, consider capital punishment as a possible alternative?

A. I don't think so.

Q. Are you morally and religiously opposed to capital punishment?

A. Yes.

Q. And you feel you couldn't bring back a sentence of--the death sentence under any circumstances?

A. I don't think so.

Q. So regardless of how severe and aggravated the circumstances are, you don't feel that you would bring back a death penalty?

A. I don't believe I could.

MR. HAMILTON: Thank you, sir. I have no other questions.

MR. FIORELLA: We would have no questions of Mr. Bumgarner.

(Venireman excused.)

THE COURT: Any challenge for cause against Harry Bumgarner?

MR. HAMILTON: The state challenges him for cause.

MR. LOZANO: Our position on the previous grounds, Judge.

THE COURT: The state's challenge of Harry Bumgarner for cause is granted. He will be excused for cause. (Tr. 168-170)

* * * * * *

THE COURT: You are Priscilla Choate?

MRS. CHOATE: Yes.

THE COURT: Mrs. Choate, Mr. Hamilton here will have some questions for you, then one of these gentlemen will have some questions for you.

MRS. CHOATE: All right.

EXAMINATION BY MR. HAMILTON:

Q. Mrs. Choate, this is a charge of capital murder, and it carries with it the possibility of the death sentence, or of captial punishment.

A. Um-hmm.

Q. Basically I am interested in inquiring of you as to what your attitude is toward capital punishment, and my question is: If, during the trial of the case the facts and circumstances that come forth as evidence are such that under the law the jury could consider the death penalty, would you, as a juror, consider the death penalty?

A. I don't believe in capital punishment.

Q. Are you opposed to capital punishment?

A. Yes, I am.

Q. Are you religiously and morally opposed to it?

A. Well, I don't know, it's just my opinion. It's not really from religion or anything like that.

Q. But it's such that you feel that you would not bring back the death penalty under any circumstances?

A. I don't think I would.

A. So, regardless of how severe or aggravated the situation is, it's your feelings that you could not impose the death sentence?

A. I don't think so.

MR. HAMILTON: Thank you.

THE COURT: Ma'am, you say you don't think so. We need to be a little more precise.

MRS. CHOATE: Well, I couldn't, no. That's just my own personal feelings; I just couldn't do it.

THE COURT: All right, ma'am, that is the purpose of these questions.

EXAMINATION BY MR. FIORELLA:

Q. Mrs. Choate, let me ask you this: Do your personal feelings, would they in any way prevent you from at least listening to the instructions and giving the death penalty a consideration in your deliberations? I mean, would you totally rule out that possibility before you heard the evidence?

A. I believe I would. I believe a person should be punished, but I can't--I can't go along with taking someone's life; I just can't do it. I mean, that's just my belief.

Q. Let me ask you this, and this is somewhat of a hypothetical question, but if, in fact, the Court instructed you to go to the jury room with the other members of the jury and deliberate and consider the evidence, and if, further as part of the instructions, the Court indicated to you that if you reached a verdict, unanimous verdict of guilty, finding Mr. Mercer guilty of the charges, that you had the right to consider a certain range of punishment and that punishment could also include, if the jury desired, the death penalty, would you, as one of those jurors, because of your convictions, totally rule out any consideration on your part as far as considering that as a penalty that you might consider as a juror? Would you rule that out because of your feelings?

A. You mean corporal punishment?

Q. Yes.

A. Yeah, I believe I would. I just can't go along with it.

MR. FIORELLA: Thank you, Mrs. Choate. We appreciate your candor about that.

THE COURT: Any challenge for cause of Priscilla Choate?

MR. HAMILTON: Yes, the state challenges her, Your Honor.

MR. LOZANO: Note our opposition, Your Honor, on the previously stated grounds, adding one other, that the state, contrary to the Sixth Amendment of the United States and contrary to statutes, is by the process of challenge for cause being permitted extra strikes which would have been peremptory strikes, and the defense is not given the equal right to an added number.

THE COURT: The challenge will be allowed. Priscilla Choate will be excused for cause (Tr. 170-773)

* * * * *

THE COURT: You are Elston Dalton?

MR. DALTON: Yes, sir.

THE COURT: Mr. Dalton, Mr. Hamilton here will have some questions for you, and then one of these gentlemen will have some questions for you.

EXAMINATION BY MR. HAMILTON:

Q. Mr. Dalton, this is a charge of capital murder, which carries a possibility of capital punishment--

A. Um-hmm.

Q. --the death penalty. And my question is about your attitude as to the death penalty. If the facts and circumstances in this trial are such that under the law the jury can consider as an alternative the death penalty, would you, as a member of that jury, be willing to consider that as a possible alternative?

A. Well, I never did much like that subject.

Q. Let me ask you then, sir, are you telling us that basically you would be unwilling to return a death penalty verdict?

A. I believe I would, sir.

Q. Would you be willing to, or be unwilling to, return such a verdict regardless of what the evidence is?

A. I didn't understand you.

Q. Are you saying, sir, that you wouldn't return a result of death, a death penalty result, regardless of what the evidence is?

A. Well, as I said, I don't believe in the death penalty.

Q. Basically the opposition is such that you wouldn't return it under any circumstances, is that correct?

A. Yeah, that's the way I feel about it.

MR. HAMILTON: That's all I have, Your Honor, thank you.

MR. LOZANO: No questions, Your Honor.

(Venireman excused.)

THE COURT: Any challenge for cause?

MR. HAMILTON: The state would ask that he be struck for cause, Your Honor.

MR. LOZANO: The defense has the obqections as earlier made. Will the Court permit it to be made that way?

THE COURT: Yes.

MR. LOZANO: Continuing objection.

THE COURT: Challenge is sustained. Elston Dalton is excused for cause. (Tr. 235-237)

* * * * *

THE COURT: You are Rosalie Delang?

MRS. DELANGE: Yes.

THE COURT: Mrs. Delange, Mr. Hamilton will have some questions for you, and then these gentlemen will have some questions for you.

MRS. DELANGE: All right.

EXAMINATION BY MR. HAMILTON:

Q. Mrs. Delange, this is a charge of capital murder, which carries with it the possibility of capital punishment, which is the death penalty.

A. Um-hmm.

Q. Basically, I am interested in your attitude as to the death penalty, and my question is: If the facts and circumstances which come out during the course of this trial are such that the jury, under the law, can consider as a possible alternative, capital punishment--

A. Um-hmm.

Q. --would you, as a member of that jury, give consideration to that as a possibility?

A. I am opposed to capital punishment.

Q. Okay, then are you basically morally and religiously against capital punishment as a punishment?

A. I would say that.

Q. Are you such that basically, regardless of what the circumstances are, you are against capital punishment?

A. I have always thought of myself as being against capital punishment. I don't really know, when you put it that way, maybe circumstances could alter my decision, but I really think I would have to say I'm against it.

Q. Am I correct in saying that basically you wouldn't vote for capital punishment regardless?

A. I think, right, I would have to say that.

Q. No matter how violent the crime might be, you would be against that as a punishment, am I correct?

A. I just don't believe in taking a life. I just don't. I'm sorry.

MR. HAMILTON: Fine, I have no other questions.

EXAMINATION BY MR. LOZANO:

Q. Mrs. Delange, what Mr. Hamilton is wanting to know and what we are wanting to know is, can you imagine of any circumstance wherein a specific instance you might consider capital punishment?

A. I suppose that if--if it were committed, the crime were committed against some one of my family, say, I would probably have to change my mind about that. That's really the only thing I can think of right now.

Q. So, Mrs. Delange, it cannot be said of you that under no circumstances would you ever consider capital punishment?

A. Well, I've always said under any circumstances, but you've got me there. I was just thinking of that circumstance, I would be hard-put to maybe-- I hate to be so long, I was just trying to think.

Q. That's all right.

A. (Pause) I had never thought of it that way. I just--I still say that I don't believe, even that may be a--I think I would just stand by my guns. I don't believe in taking a life.

Q. I understand that, but, of course, you mentioned that your family situation was different.

A. Well, yes, I thought at first, and then I think it really to me doesn't accomplish that much.

Q. I know, whether it accomplishes anything or not, the question is really directed at whether or not you can serve on this jury.

A. I see.

Q. Of course, if you absolutely cannot under any circumstances consider capital punishment, then you would--

A. I have always been very much against it.

Q. I understand that, but let me repeat myself and ask you--

A. Um-hmm.

Q. --if--can you say that you would never consider capital punishment under any circumstances whatsoever?

A. I will say that.

Q. And would you say that's truthfully?

A. Yes, oh, yes. I'm trying very hard to examine my conscience here.

Q. Okay, that's precisely what we want you to do.

MR. LOZANO: I have no further questions.

(Venireman excused.)

THE COURT: Any challenge for cause?

MR. HAMILTON: Yes, Your Honor. We would ask that she be struck for cause.

THE COURT: Very well, Rosalie M. Delange will be excused for cause upon the challenge of the state.

MR. LOZANO: Judge, would the record reflect that the challenge for cause is over my objection consistent with the objections I have made earlier, which is that the jury which we are seeking an paneling would not be representative of a cross section of the community?

THE COURT: Yes. (Tr. 254-257)

* * * * *

APPENDIX F

Jurors: Use this form only if the punishment fixed by you is death. See Instruction No. 20 for directions as to what must be written into the verdict form if the death penalty is imposed. Use the reverse side of this form if necessary. The foreman's signature must appear at the end of the matter which you designate in writing as the aggravating circumstance or circumstances which all twelve jurors found beyond a reasonable doubt.

We, the jury, having found the defendant guilty of the capital murder of Karen Keeton, fix the defendant's punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:

INSTRUCTION # 16

#1. & #2.

1. The defendant, as an agent or employee of Stephen Gardner and at his direction, murdered Karen Keeton.
2. The murder of Karen Keeton involved depravity of mind and that as a result thereof it was outrageously or wantonly vile and inhuman.

John W. Keough

INSTRUCTION NO. 16

In determining the punishment to be assessed against the defendant for the murder of Karen Keeton, you must first unanimously determine

1. Whether the defendant, as an agent or employee of Stephen Gardner and at his direction, murdered Karen Keeton.

2. Whether the murder of Karen Keeton involved depravity of mind and that as a result thereof it was outrageously or wantonly vile and inhuman.

You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

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INSTRUCTION NO. 18

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 17, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Karen Keeton.

You may also consider

1. Whether Karen Keeton was a participant in the defendant's conduct or consented to the act.

2. Whether the defendant acted under extreme duress or substantial domination of another person.

3. The age of the defendant at the time of the offense.

You may also consider the absence of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

APPENDIX G

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.